No. 24-982

In the
Supreme Court of the United States

EXXONMOBIL CORPORATION, ET AL.,
Petitioners,

v.

ENVIRONMENT TEXAS CITIZEN LOBBY, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMERICAN FREE CHAMBER OF COMMERCE AND ENERGY FREEDOM FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Formed in 2022, the American Free Enterprise Chamber of Commerce ("AmFree") is an entity organized consistent with section 501(c)(6) of the Internal Revenue Code that represents hard-working entrepreneurs and businesses across all sectors of the U.S. economy.

AmFree launched the Center for Legal Action ("CLA") to represent these interests in court. CLA is spearheaded by two-time former U.S. Attorney General Bill Barr. As the chief lawyer for the United States under two presidents, former Attorney General Barr knows first-hand the costs of allowing private persons to seek civil penalties outside of the Attorney General's control. *See, e.g.*, *United States v. DTE Energy Co.*, No. 2:10-cv-13101-BAF-RSF, 2020 WL 10730046, at *2–4 (E.D. Mich. Dec. 3, 2020) (approving a side deal with Sierra Club requiring an energy company to fund electric buses and shut down three coal plants, over the objection of the United States). He is the author of a frequently cited Office of Legal Counsel opinion on the "*qui tam*" provisions of the False Claims Act. *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207 (1989). Citizen suits raise similar constitutional questions.

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[1] *Amici curiae* provided timely notice of intent to file this brief to all parties. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

Formed in 2025, Energy Freedom Fund, Inc., is an entity organized consistent with section 501(c)(4) of the Internal Revenue Code that advocates for energy freedom policies based on the conviction that they are essential to human flourishing in general, and to America's prosperity and security in particular. Energy Freedom Fund is the vision of its Founder and President, Alex Epstein, an author and philosopher whose writing focuses on the moral dimension of energy policy. His published works include *The Moral Case for Fossil Fuels* and *Fossil Future*. A consistent theme in his writings and in Energy Freedom Fund's work is that liberty and energy freedom are morally right. As this case demonstrates, citizen suits pose a serious threat to liberty and the Constitution's structural safeguards against tyranny, with the assault on energy freedom serving as the canary in the coal mine.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]his wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J, dissenting). For the past 15 years, in litigation spanning four different presidential administrations, Respondents—private, non-governmental organizations—have wielded the prosecutorial power of the United States. They seek to prosecute ExxonMobil for violations of the Clean Air Act and impose public fines payable to the Treasury. That remedy seeks not to prevent an injury to Respondents or their members, but to vindicate the "undifferentiated" interest of the United States in the prosecution of public offenses and deterrence. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998).

Article III courts should never have gone along with this. "Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions." *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019) (Barrett, J.). Under Article III, this should have been the easy case, resolved through a motion to dismiss 15 years ago. *Cf. Steel Co.*, 523 U.S. at 104 ("This case is on appeal from a Rule 12(b) motion to dismiss on the pleadings …").

But *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167 (2000), opened the door to freewheeling quasi-criminal prosecutions such as this one. *Laidlaw* held that the Article III requirement of redressability is satisfied based upon the assumed incidental "deterrent power" of imposing a civil penalty payable to the United States for

past violations. *Id.* at 186–88. While acknowledging that its assumption had no "scientific basis," the Court held that the possibility of deterrence would establish redressability to seek public fines in the "ordinary case." *Id.* at 186–87.

Laidlaw must be laid to rest. *Laidlaw*'s theory of redressability through the incidental effects of a fine upon deterrence is egregiously wrong. After all, advisory opinions by this Court, too, may have a deterrent effect. *Laidlaw's* reasoning effectively abolishes core standing requirements for "citizen-suit" cases. Courts have not been able to establish limits on *Laidlaw*'s theory of deterrence in its "idealized ordinary case." *Cf. Sessions v. Dimaya*, 584 U.S. 148, 158 (2018). As a result, redressability has simply fallen by the wayside, making *Laidlaw* a singular exception to this Court's "triad of injury in fact, causation, and redressability," which "constitutes the core of Article III's case-or-controversy requirement." *Steel Co.*, 523 U.S. at 103–04. Redressability is not merely relaxed for plaintiffs in these cases, but assumed at the very outset. Pet.31–32. Indeed, under the Fifth Circuit's approach, *Laidlaw* also eliminates any need to trace fines to a specific violation that harms the plaintiff. The oddity of that constitutional exception to ordinary standing rules justifies overruling *Laidlaw*'s holding of redressability. *Laidlaw* should not become another "*Flast v. Cohen* exception" to standing. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 608 (2007).

But *Laidlaw*'s harms go far beyond this. By throwing open the courthouse door, *Laidlaw* enlists courts in an unconstitutional encroachment upon Article II. "Separation of powers is a zero-sum game. If

one branch unconstitutionally aggrandizes itself, it is at the expense of one of the other branches." John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1223 (1993).

This case powerfully illustrates the point. Respondents here are exercising "enforcement authority" that "includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court," "a quintessentially executive power." *Seila Law LLC v. CFPB*, 591 U.S. 197, 219 (2020). Allowing "any person" to carry out that core prosecutorial function raises "fundamental [Article II] questions." *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring). Nobody elected Respondents, no official appointed them, and they have taken no oath of allegiance. Nor are they in any way accountable to the President or to the Attorney General. And yet, for 15 years, Respondents have exercised the core executive power to prosecute. Allowing private groups to exercise executive power without "meaningful public control" has grave consequences for the liberty and accountability the constitution's structure protects. *See id.* at 209.

Overruling *Laidlaw* is not just the right thing to do; it is the modest thing, too. "A standing decision simply means that Congress cannot enlist the federal courts in its enterprise." Roberts, *supra*, at 1229. The Court should take up this case as an "ideal vehicle" to reconsider *Laidlaw*. Pet.App.288a–89a n.3 (Oldham, J.).

BACKGROUND

A. The Clean Air Act "Citizen-Suit"

Persons suffering special harm have long been authorized to sue in equity to abate public nuisances. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 345 (2016) (Thomas, J., concurring). By and large, "citizen-suit" provisions build upon that tradition. "Most environmental citizen-suit provisions only provide for injunctive relief and legal costs, (including attorneys' fees) for successful plaintiffs" because "the relief is aimed at remedying the permit violation or other illegal action." Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 47 (2001).

The Clean Air Act is different. The Clean Air Act is one of very few statutes authorizing private persons to prosecute public offenses by seeking not injunctions, nor even damages, but civil penalties payable to the Treasury, even when the executive branch decides that punishment is unwarranted.

Subject to a 60-day notice requirement, "any person" may "commence a civil action on his own behalf … against any person … who is alleged to have violated … or to be in violation of" numerous Clean Air Act requirements, including conditions in onerous Title V permits. 42 U.S.C. § 7604(a)(1), (a)(3), (f). Private parties may not bring an enforcement action if the United States or a State "has commenced and is diligently prosecuting a civil action." *Id.* § 7604(b)(1)(B). Courts must thus examine current prosecutions for "diligence"—a "constitutionally bizarre" arrangement. *Laidlaw*, 528 U.S. at 210 (Scalia, J., dissenting). But regardless, private parties "may intervene as a

matter of right" when the United States or a State files a civil lawsuit. 42 U.S.C. § 7604(b)(1)(B). As intervenors, private groups exercise the same rights as the United States, so they are co-equal prosecutors. *See* Caleb Nelson, *Intervention*, 106 Va. L. Rev. 271, 273–74 (2020).

Private plaintiffs or intervenors, as the case may be, may then seek enormous civil penalties—over $120,000 per day of violation under the Clean Air Act—on top of attorneys' fees and costs. 42 U.S.C. § 7413(b); 40 C.F.R. § 19.4. Unlike relators in *qui tam* actions, however, citizen plaintiffs are assigned no portion of the penalty award: by law, the penalties must be deposited in a "special fund in the United States Treasury." 42 U.S.C. § 7604(g)(1). The penalty is thus public money. *See Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 264 (1999).

Very few federal laws share these features, and all are of 1970s or later vintage. The Clean Water Act has a similar, well-known citizen-suit provision. 33 U.S.C. § 1365. So do the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), the 1976 Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. §§ 6972(a), 6928(g), 9659(a), 11046(a)(1)(A), (c). These federal laws raise unique constitutional questions.

B. *Steel Co.* and *Laidlaw*

Before *Laidlaw*, there was *Steel Co.* In *Steel Co.*, a citizen-group plaintiff sued a steelmaker for failing to comply with its disclosure obligations under EPCRA, seeking, as relevant here, civil fines payable

to the Treasury. *Steel Co.*, 523 U.S. at 87–88. During the 60-day notice period, however, the steelmaker updated its EPCRA filings to comply with the law. *Id.*

This Court held that the plaintiffs failed to establish "redressability." *Id.* at 105. Addressing the request for civil penalties specifically, the Court explained:

> These penalties–the only damages authorized by EPCRA—are payable to the United States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury … but vindication of the rule of law—the "undifferentiated public interest" in faithful execution of EPCRA. This does not suffice.…

Id. at 106–07. The Court then explained that the possibility that "punishment will deter the risk of future harm" wasn't enough for standing, and warned that holding otherwise would conflict with precedent and "make the redressability requirement vanish." *Id.* at 107 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 96 (1976)).

Two terms later, however, this Court departed from *Steel Co.* In *Laidlaw*, a hazardous waste incinerator was violating its discharge permits under the Clean Water Act at the time of suit. 528 U.S. at 175–76. Before final judgment, the incinerator finally managed to comply. The district court nevertheless imposed civil penalties. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 956 F. Supp. 588, 610–12 (D.S.C. 1997). Applying *Steel Co.*, however, the court of appeals held that the case was moot.

Friends of Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 149 F.3d 303, 306–07 (4th Cir. 1998).

This Court reversed. *Laidlaw*, 528 U.S. at 195. Addressing initial standing, the Court asserted that "penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation." *Id.* at 174. The Court claimed that would be true "in the ordinary case," and in the case before it. *Id.* at 186–87. The Court further limited *Steel Co.* to its facts, noting that in *Steel Co.* "there was no allegation in the complaint of any continuing or imminent violation." *Id.* at 187.

Justice Scalia, joined by Justice Thomas, dissented. He argued that the Court's redressability holding was inconsistent with *Steel Co.*, "has no precedent in our jurisprudence," and "has grave implications for democratic governance." *Id.* at 202 (Scalia, J., dissenting).

ARGUMENT

"*Stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). "This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible." *Id.* (quotation marks omitted).

Overruling precedent, to be sure, requires a "special justification" and more than "garden-variety error." *Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part). But all of the factors this Court has identified justify overruling *Laidlaw*'s redressability holding.

First, *Laidlaw* is "egregiously wrong as a matter of law." *Id.* at 122. *Laidlaw* cannot be reconciled with this Court's precedent in general, and *Steel Co.* in particular. Relatedly, *Laidlaw* has "significant negative jurisprudential [and] real-world consequences." *Id.* For one, *Laidlaw*'s theory of redressability is unworkable: judges are not equipped to determine the "vanishing point" of deterrence under *Laidlaw*, so they have simply given up on redressability altogether. And by disconnecting the remedy from the harm, *Laidlaw* has invited federal courts to nullify not just redressability, but traceability too, as this litigation shows.

Second, *Laidlaw* raises grave questions under Article II. These harms are more than theoretical: enlisting Article III courts in proceedings brought by private prosecutors outside of the President's control poses real-world threats to liberty, and by extension, to human flourishing and the common good.

Overruling *Laidlaw* would upset no reliance interests. *Id.* The citizen-plaintiffs bringing these suits

seek to vindicate public rights; they have no property in public money going to the Treasury. Pet.32.

I. *Laidlaw* Is Egregiously Wrong and Unworkable

Article III of the U.S. Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. This Court has "always taken this to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. A core component is standing. Under Article III, a "plaintiff cannot establish standing by asserting an abstract general interest common to all members of the public, no matter how sincere or deeply committed a plaintiff is to vindicating that general interest on behalf of the public." *Carney v. Adams*, 592 U.S. 53, 59 (2020) (cleaned up).

Citizen suits, by definition, are suits to vindicate a duty to the public, as opposed to their private rights. Citizen-plaintiffs "seek relief not on their own behalf but on behalf of society as a whole." *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 477 (6th Cir. 2004) (Sutton, J.); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 427–428 & n.1 (2021); *see also id.* at 446–47 (Thomas, J., dissenting) (same). At least for these private attorney general suits, courts have long required "more than just a legal violation": the plaintiff must show a harm distinct from the public's that is redressable by the judgment. *Id.* at 451 (Thomas, J. dissenting); *see also Thole v. U. S. Bank N.A.*, 590 U.S. 538, 548 (2020) (Thomas, J., concurring). Indeed, following

"decades of precedent," this Court has held that a concrete harm is mandatory in all cases. *TransUnion LLC*, 594 U.S. at 429–30 & n.3.

The Court has distilled the "irreducible" elements of standing into a three-part test. *Lujan v. Defs. of Wildlife*, 504 U.S. 560 (1992). To establish standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC*, 594 U.S. at 423. "[T]he party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co.*, 523 U.S. at 103–04. These elements often overlap: most obviously, causation and redressability are linked. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380–81 (2024).

The last element, redressability is about judgments and remedies. It asks, essentially, "whether a plaintiff 'personally would benefit in a tangible way from the court's intervention.'" *Steel Co.*, 523 U.S. at 103 n.5 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). The relevant "intervention" is the *judgment*. Requiring that the court's judgment "redress the individual plaintiffs' injuries" ensures that a federal court doesn't enter "an advisory opinion." *California v. Texas*, 593 U.S. 659, 672–73 (2021). "Remedies are" thus "critical to the proper exercise of the judicial power." William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 Harv. L. Rev. 153, 158 (2023). "Indeed, it would be no exaggeration to say that one of the most important reasons that plaintiffs must demonstrate their injury in the first place is so that

they can demonstrate that they are seeking the proper relief to redress it." *Id.*

By coupling a private prospective harm with a public retrospective remedy, *Laidlaw* conflicts with these core principles.

A. *Laidlaw* Conflicts with Precedent, History, and Tradition

Until *Laidlaw*, there was no "precedent, history, or tradition of courts" finding standing based upon the plaintiff's interest in the incidental future deterrent effect of imposing a public fine—an abstract interest shared by the sovereign. *United States v. Texas*, 599 U.S. 670, 677 (2023). *Laidlaw*'s holding thus had "no precedent in [the Court's] jurisprudence." *Laidlaw*, 528 U.S. at 202 (Scalia, J., dissenting).

Worse, *Laidlaw* departed from precedent. In *Steel Co.*, this Court rejected the same theory. It wasn't enough that "punishment will deter the risk of future harm." *Steel Co.*, 523 U.S. at 107. "Obviously, such a principle would make the redressability requirement vanish," and make its precedent "inexplicable." *Id.* "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Id.*

Laidlaw purported to distinguish *Steel Co.*, saying it does not apply when plaintiffs "seek penalties for violations that are ongoing at the time of the complaint and that could continue into the future if undeterred." *Laidlaw*, 528 U.S. at 188. But no such caveat appears in *Steel Co.* Nor should it. Whether violations are "ongoing at the time" or likely to recur has nothing to do with whether public fines afford a cognizable

remedy to plaintiffs that aren't entitled to a single dollar.

What *Steel Co*. did say was that "a continuing violation or the imminence of a future violation" could justify *injunctive* relief tailored to a plaintiff's risk of future injury. 523 U.S. at 108. But *Steel Co.* unequivocally rejected standing based upon *Laidlaw*'s theory that "punishment will deter the risk of future harm." *Id.* at 107. For good reason. Unlike an injunction, that remedy has no roots in "the traditional business of Anglo-American courts": providing "relief specifically tailored to the plaintiff's injury, and not *any* sort of relief that has some incidental benefit to the plaintiff." *Laidlaw*, 528 U.S. at 204 (Scalia, J., dissenting). *Laidlaw*'s theory, as the dissent noted, is also hard to square with other precedents of this Court, including with *Linda R.S*, *id.* at 203–05, or even with the basic prohibition against issuing advisory opinions: after all, an advisory opinion from this Court will also deter conduct.

Laidlaw has only become more of an outlier since it was decided.

In *United States v. Texas*, for example, Texas lacked standing to challenge a federal nonenforcement policy that conflicted with the federal government's statutory duty to take certain aliens into custody, even though Texas incurred monetary costs due to underenforcement. 599 U.S. at 674. Texas's interest in the federal government's immigration "arrest policies" wasn't "cognizable." *Id.* at 681–82. A plaintiff, the Court reasoned, doesn't have an interest in the prosecution of another. As the Court understood it, that was the teaching of *Linda R.S. But see Laidlaw*, 528 U.S. at 188 n.4.

If plaintiffs lack a cognizable interest in the government filling its prisons with illegal aliens, then how do they have a cognizable interest in the government filling its coffers with public fines? They don't. *Linda R.S.* "applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State." *Laidlaw*, 528 U.S. at 204 (Scalia, J., dissenting). "Ours," after all, "is a world filled with more and more civil laws bearing more and more extravagant punishments." *Dimaya*, 584 U.S. at 184 (Gorsuch, J., concurring in part and concurring in the judgment). There is no "civil" exception to Article III.

The concurring opinion in *Texas* focused on "redressability," but the reasoning also undercuts *Laidlaw*. *Texas*, 599 U.S. at 690 (Gorsuch, J., concurring in the judgment). As the concurring Justices saw it, "[a] judicial decree rendering the Guidelines a nullity does nothing to … require federal officials to change how they exercise that discretion in the Guidelines' absence." *Id.* at 691. Federal courts don't "measure redressability by asking whether a court's legal reasoning may inspire or shame others into acting differently." *Id.* Under *Laidlaw*, however, courts must assume that penalties will inspire shame or fear, even though paying a fine doesn't prevent facilities from violating the law in the future.

Thole is also instructive. The plaintiffs in *Thole* were pension plan beneficiaries bringing suit to vindicate violations of ERISA's duties, but the plaintiffs had a defined benefit plan entitling them to money regardless and had received every penny owed. *Thole*, 590 U.S. at 541. Unlike *qui tam* relators, the plaintiffs were assigned no interest in prosecuting the action.

Id. at 543–44. They thus lacked a cognizable injury that could be redressed by the suit. *Id.* at 541. Would *Thole* turn out differently if the plaintiffs alleged they were "concerned" by the fiduciary's mismanagement, losing sleep, and thus prevented from going fly fishing and living out their best life? *Cf. Laidlaw*, 528 U.S. at 181–83.

Other cases are directionally consistent, enforcing the redressability requirement. In *Haaland v. Brackeen*, a declaratory judgment's "possible, indirect benefit in a future lawsuit" was not enough to show redressability. 599 U.S. 255, 294 (2023). Under *Laidlaw*, however, the possible, indirect effect of a fine is good enough, even though a judgment awarding fines doesn't bind ExxonMobil to avoid emissions in the future. In *Murthy v. Missouri*, the Court also held that "the plaintiffs have a redressability problem." 603 U.S. 43, 73 (2024). Although social media platforms adopted moderation policies in response to the government's pressure, an injunction against government officials would not prevent private censorship, as the "platforms remain[ed] free to enforce, or not to enforce, those policies—even those tainted by initial governmental coercion." *Id.* The same is true here. ExxonMobil will remain free to do nothing after paying a fine. Nothing in an award of civil penalties will require otherwise.

B. *Laidlaw* Abolishes Core Standing Requirements

By matching private forward-looking harm to a public retroactive remedy, *Laidlaw* also guts standing, for at least two reasons.

First, *Laidlaw*'s reasoning abolishes redressability for citizen plaintiffs. *Laidlaw*, to be sure, said "that there may be a point at which the deterrent effect of a claim for civil penalties becomes so insubstantial or so remote that it cannot support citizen standing," but acknowledged that this "vanishing point is not easy to ascertain." 528 U.S. at 186. The Court, however, claimed that this "does not detract from the deterrent power of such penalties in the ordinary case." *Id.*

Twenty-five years after *Laidlaw*, no court has found a "vanishing point." *Laidlaw*'s "idealized ordinary case," it seems, has no limits. *Cf. Dimaya*, 584 U.S. at 158. Indeed, how could a "vanishing point" be identified? "A survey? Expert evidence? Google? Gut instinct?" *Id.* at 158. No one knows. Courts applying *Laidlaw* have therefore simply assumed redressability. *See* Pet.App.67a–68a.

Second, by matching a private future harm with a retrospective public punishment, *Laidlaw* may abolish traceability, too. According to several judges of the Fifth Circuit, *Laidlaw* eliminates the plaintiff's need to trace past harms back to particular regulatory violations to seek fines. Pet.App.12a–25a (Davis, J., concurring). *Laidlaw* thus allows the plaintiff' risk of harm, alone, to "become a lever that will move the world." *Laidlaw*, 528 U.S. at 205 (Scalia, J., dissenting).

This litigation proves the point. Because Respondents' interest in the fines under *Laidlaw* is, in theory, purely preventive, or so the argument goes, they didn't have to trace the fines to any harm caused by any of the violations. That holding "essentially eliminates traceability," and licenses standing in gross. Pet.App.123a (Jones, J., dissenting). The result

is not just wrong: it is "preposterous." *Laidlaw*, 528 U.S. at 204 (Scalia, J., dissenting). "There is no [citizen-suit] exception to Article III." *Thole*, 590 U.S. at 547.

C. *Laidlaw*'s Theory of Deterrence Is Wrong or Speculative

"[F]ines have no preventive effect." Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 Colum. L. Rev. 1193, 1216 (1985). Yet, in *Laidlaw*, the Court assumed, without a "scientific basis," that fines would prevent violations "in the ordinary case." *Laidlaw*, 528 U.S. at 186–87. That was wrong, or at least, speculative.

The *threat* of civil penalties *may* deter pollution, but only when the expected cost of the fine exceeds the cost of abating the pollution in question. In other words, deterrence is likely only when a firm expects a penalty will "remove any significant economic benefit resulting from noncompliance." U.S. Env't Prot. Agency, *Clean Air Act: Stationary Source Civil Penalty Policy* 4 (1991). In many cases, however, a firm may reasonably expect that the cost of fines will be less than the cost of abating its emissions. Judges don't always "remove" the entire benefit of past noncompliance. For a reason: perfect compliance with regulatory law is not always possible, nor desirable. Judges, for example, also weigh the seriousness of the harm when imposing penalties. When the harms of non-compliance are trivial, as here, Pet.10, the firm's expected penalty is unlikely to be high enough to deter future regulatory violations. That is a good thing too, as deterring those violations would do more harm than good. *Laidlaw*'s assumption that civil penalties

will deter "in the ordinary case" is thus an empirical question, not one that can be casually assumed from the bench. *Laidlaw*, 528 U.S. at 186.

Laidlaw also failed to distinguish between general deterrence and specific deterrence. "'General' deterrence means deterrence of others besides the offender; 'specific' deterrence means deterring this offender from repeating his offense." *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) (Posner, C.J.). General deterrence is irrelevant to standing: the plaintiff must show that the fine will deter *the defendant* from repeating the harmful offense. Or, as Justice Scalia put it, "[t]he deterrence on which the plaintiffs must rely for standing in the present case is the marginal increase in Laidlaw's fear of future penalties that will be achieved by adding federal penalties for *Laidlaw*'s past conduct." 528 U.S. at 205–209 (Scalia, J., dissenting).

Laidlaw provided no support for such an effect. The Court relied only on a folksy intuition that "a defendant once hit in its pocketbook will surely think twice before polluting again." *Id.* at 186 (majority op.) (emphasis added). That assumes that sophisticated firms such as ExxonMobil behave irrationally, operating through a kind of recency bias. Once fined, ExxonMobil will finally "think twice," reform, and respond to incentives. More likely, ExxonMobil concluded all along that abating the largely harmless and hard-to-avoid emissions at issue here would exceed the expected cost of the fine. Otherwise, ExxonMobil would have fully complied before or during the 60-day time window to avoid this suit. Therefore, "once hit in its pocketbook," ExxonMobil will likely continue behaving in the same way, because it makes economic sense

to do so. *Laidlaw*'s intuition is thus "speculative" as a matter of law and fact. *Id.* at 205–209 (Scalia, J., dissenting).

II. *Laidlaw* Raises Grave Article II Concerns

Laidlaw's conflict with precedent, inconsistency with history and tradition, odd exceptions to standing, and its improvised and unscientific assumption of deterrence, are good enough reasons to overrule it. But on top of that, by opening the courthouse door, *Laidlaw* raises grave Article II concerns.

A. The Power To Prosecute Public Fines for Public Offenses Belongs to the President Alone

The Constitution's Vesting Clause provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. The Vesting Clause makes clear that "[t]he entire 'executive Power' belongs to the President alone." *Seila Law*, 591 U.S. at 213. Article II in turn assigns to the President the power to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Although the President may rely upon subordinate officers, "[t]hese lesser officers must remain accountable to the President, whose authority they wield." *Seila Law*, 591 U.S. at 213. Statutes that vest executive power outside of the President's control are "acts of usurpation," and "deserve to be treated as such." The Federalist No. 33 (Alexander Hamilton).

The "executive Power," as understood in 1789 and today, includes the core law enforcement power to prosecute all public offenses, whether civil or criminal. The king, Blackstone recognized, is the "proper

person to prosecute for all public offences and breaches of the peace." 1 William Blackstone, *Commentaries on the Laws of England* *268 (J.B. Lippincott Co., 1893) (1765–69). During the colonial era and under the Articles of Confederation, it was also understood that the "executive authority's essential function consisted of law enforcement[.]" Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 735 (2003).

Early historical practice confirms the point. "[D]uring the Washington administration, prominent officials across all three branches recognized the president's role as chief law enforcement executive." *Id.* at 800. Indeed, Washington personally "ordered his federal prosecutors to cease prosecutions, and to commence them." *Id.* at 802 (footnotes omitted). Thus, while Congress could allow district attorneys to "prosecute potential lawbreakers," the "president is the chief of these law enforcement executives." *Id.* at 737.

Consistent with original understanding, the Supreme Court has recognized that "[u]nder Article II, the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *Texas*, 599 U.S. at 678–79. "The President may decline to prosecute … because of the President's own constitutional concerns about a law *or* because of policy objections to the law, among other reasons." *In re Aiken Cnty.*, 725 F.3d 255, 263 (D.C. Cir. 2013) (Kavanaugh, J.). Indeed, the Take Care Clause makes the President's authority over enforcement actions "conclusive and preclusive," meaning that Congress is "disable[d]" from "acting upon the subject." *Trump v. United*

States, 603 U.S. 593, 607, 620 (2024) (quotation omitted).

The President's enforcement discretion is not limited to proceedings labeled "criminal": "the Executive may decline to seek *civil* penalties or sanctions (including penalties or sanctions in administrative proceedings) on behalf of the Federal Government in the same way. Because they are to some extent analogous to criminal prosecution decisions and stem from similar Article II roots, such civil enforcement decisions brought by the Federal Government are presumptively an exclusive Executive power." *In re Aiken Cnty.*, 725 F.3d at 264 n.9; *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion.").

B. The Clean Air Act's Citizen-Suit Provision Hands Over Core Prosecutorial Power to Private Persons

The Clean Air Act hands over enormous law enforcement power to private groups outside of the President's control. Such "enforcement authority" that "includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court," is "a quintessentially executive power." *Seila Law*, 591 U.S. at 219. In essence, the Clean Air Act's citizen-suit provision thus transforms the President's core constitutional domain into a public commons. That violates Article II's Vesting and Take Care Clauses. *Seila Law*, 591 U.S. at 215; *Trump*, 603 U.S. at 620.

Qui tam does not excuse this constitutional evasion. "There are substantial arguments that the *qui tam* device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation," even though the United States retains significant oversight authority over private relator suits. *United States, ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 442 (2023) (cleaned up) (Kavanaugh, J., concurring); *id.* at 449 (Thomas, J. dissenting). But no such check exists here. The Clean Air Act's unique innovation therefore does not inhabit the same "constitutional twilight zone" as *qui tam* claims; it is far more troubling. *Id. at* 449 (Thomas, J., dissenting).

At least the independent counsel could be fired for "good cause." *Morrison*, 487 U.S. at 691. Groups such as Respondents, by contrast, are unaccountable "self-appointed mini-EPA[s]." *Laidlaw*, 528 U.S. at 209 (Scalia, J., dissenting).[2] The Court should not sanction this private usurpation of the President's authority to vindicate public wrongs through public fines.

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[2] Not so mini. Earthjustice, which often represents Respondent Sierra Club, for example, has at least 200 attorneys, more than EPA's Office of General Counsel. *Our Offices and Programs*, Earthjustice, https://earthjustice.org/about/contact (last visited May 8, 2025); *Attorney Positions and Fellowships in EPA's Office of General Counsel (OGC)*, EPA, https://www.epa.gov/careers/attorney-positions-and-fellowships-epas-office-general-counsel-ogc (last updated Feb. 14, 2025).

C. *Laidlaw* Undermines Liberty and Accountability

By opening the courthouse door, Laidlaw invites grave Article II questions, and concomitant serious harms. The Framers vested *all* executive power in a President for a reason. Vesting executive power in a single President would ensure "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty." *Seila Law*, 591 U.S. at 223–24 (quoting The Federalist No. 70 (Alexander Hamilton)). Allowing private groups to exercise executive power undermines all of these constitutional ends.

"Tens of thousands of facilities are subject to federal environmental regulations nationwide. On any given day, a substantial portion of these facilities violates the technical requirements imposed by environmental regulations." Adler, *supra*, at 43. Punishing all regulatory violations is suboptimal. Indeed, in many cases, prosecuting regulatory violations may have "no tangible environmental benefit." *Id.* at 50.

The President and his subordinates, in such cases, may decide to underenforce the law by refraining from seeking penalties when doing so doesn't serve the public interest, thus protecting private liberty and property from unnecessary interference. Allowing a single President (or his subordinates) to make those discretionary enforcement judgments ensures the steady administration of the laws. And it protects the country against influence by foreign adversaries.

Allowing citizen-plaintiffs to second-guess these executive non-enforcement judgments undercuts these ends. Factions such as Respondents will pursue enforcement actions tailored to their constituencies (including donors that may have a financial interest in industry competitors) rather than the voting public. Unsurprisingly, they often use public fines as leverage to seek "settlements requiring the defendant to support environmental projects of the plaintiffs' choosing," converting public fines to private gain. *Laidlaw*, 528 U.S. at 210 (Scalia, J., dissenting) (citing Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tulane L. Rev. 339, 355–59 (1990)). In some cases, these deals may be struck over the opposition of the United States. *See, e.g.*, *DTE Energy*, 2020 WL 10730046, at *2. Last, allowing private groups to act as prosecutors exposes Americans to foreign attack. Foreign adversaries may influence, infiltrate, or manipulate private groups to target U.S. energy infrastructure and manufacturing capacity, and thus to weaken the United States. *Cf.* Michael Shellenberger, *Maybe They're So Quiet About Chinese Solar and Russian Gas Because They're So Heavily Invested In Them*, Public (May 25, 2021), https://www.public.news/p/maybe-theyre-so-quiet-about-chinese. Private citizen suits for penalties heighten the consequences of that risk.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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