No. 24-982

In the Supreme Court of the United States

EXXONMOBIL CORPORATION; EXXONMOBIL CHEMICAL COMPANY; EXXONMOBIL REFINING & SUPPLY COMPANY,

Petitioners,

v.

ENVIRONMENT TEXAS CITIZEN LOBBY, INCORPORATED; SIERRA CLUB,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

As petitioners have explained, the Fifth Circuit's splintered en banc decision in this case ultimately perpetuates a "disastrous" Fifth Circuit standing doctrine for citizen-suit cases that flouts Article III principles and grants environmental plaintiffs "standing in gross." App.97a (Jones, J., dissenting); *id.* at 282a (Oldham, J., dissenting). Under the Fifth Circuit's rule, a *single* harm resulting from a *single* violation results in standing to sue—and secure civil penalties—for all violations of a similar "kind," regardless of whether the violations actually or likely affected the plaintiff at all. For associations like respondents, this is a bonanza, allowing them to rack up thousands of alleged violations and penalties simply by showing that one or a small number of members suffered discrete harms. Almost everyone on the Fifth Circuit disagreed with this rule, but they could not agree on a path forward and so left it in place. This Court's intervention is needed.

Respondents do not dispute the exceptional importance of the questions presented—nor could they. Twenty-seven States assert a "strong interest" in certiorari because the Fifth Circuit's "expanded view" of citizen-suit standing "frustrates core federalism principles." States Amicus Br. 1, 17. A cross-section of the U.S. business community warns that the Fifth Circuit's "diluted standing test" disregards "bedrock standing principles" and fuels a "uniquely burdensome" form of litigation. Chamber Amicus Br. 8, 19, 20-22. And a separate set of groups stresses the "grave Article II concerns" implicated by this Court's "egregiously wrong" decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*

(TOC), Inc, 528 U.S. 167 (2000). American Free Enterprise Chamber of Commerce (AmFree) Amicus Br. 4, 20. Respondents ignore all this.

Instead, respondents cobble together a hodge-podge of vehicle arguments to scare away this Court from these important issues. They make the almost laughable claim that the Fifth Circuit's radically splintered decision in this case actually *resolves* the "instability" in that court's standing doctrine. BIO 15. They claim that there is nothing for this Court to review, even though they acknowledge that the Fifth Circuit's decision perpetuates the grossly flawed "*Cedar Point[]* traceability framework." *Id.* They claim that the case presents "thorny antecedent questions" that the Court would have to reach, *id.*, even though they failed to cross-petition on those issues. And they suggest that petitioners somehow waived the second question presented by not asking *the Fifth Circuit* to overrule *Laidlaw*'s flawed redressability rule. *Id.* at 29-30.

All of this is a smokescreen. There is no impediment to reaching the important questions presented, and the en banc Fifth Circuit's inability to realign its own standing precedent with this Court's decisions demands this Court's intervention. At the least, the Court should CVSG to give the Executive Branch—whose primary enforcement role under the Clean Air Act (CAA) is diminished by unduly lax citizen-suit standing—an opportunity to weigh in.

ARGUMENT

I. The Traceability Question Warrants Review

The Fifth Circuit's lax traceability standard for environmental citizen suits "flatly violates Article III," flouts this Court's precedents, and sanctions

"standing in gross" for environmental plaintiffs. Chamber Amicus Br. 7-16; Pet. 20. This Court's review is needed. And respondents' efforts to evade such review on vehicle grounds fails.

A. The Fifth Circuit's Rule Sharply Departs From This Court's Precedents And Has Generated Significant Discord

Amidst all of respondents' hand-waving about the Fifth Circuit's traceability rule for citizen suits (at 25-27), one thing is especially striking: respondents do not even *try* to reconcile the Fifth Circuit's rule that a plaintiff need only show that a violation "contributes to the *kinds* of injuries alleged" and "*could have affected* the plaintiff," *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.* (*Cedar Point*), 73 F.3d 546, 557 (5th Cir.) (emphases added) (citation omitted), *cert. denied*, 519 U.S. 811 (1996); App.208a, with Article III's requirement that a plaintiff show his "injury was *likely caused* by the defendant," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (emphasis added). In fact, respondents ignore *Cedar Point*'s language in the merits section of their opposition. Probably because they know the *Cedar Point* rule flouts this Court's "likely caused" standard, as Judge Aldisert flagged when the Third Circuit first introduced this problematic framework. *See Public Int. Rsch. Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 89 (3d Cir. 1990) (concurring) ("Were this not an environment case, [the plaintiff's showing] certainly would not be [enough to demonstrate standing]."), *cert. denied*, 498 U.S. 1109 (1991).

Unable to defend that *Cedar Point* rule on its own terms, respondents simply complain (at 27) that petitioners "preview no alternative" to *Cedar Point*.

Nonsense. Petitioners' alternative is the rule required by Article III and this Court's precedents in every other context: environmental citizen-suit plaintiffs, like other plaintiffs, must show that a violation of an emissions limit *likely* injured them to have standing to sue over it. Pet. 24. This alternative would bring citizen-suit standing doctrine in line with the Article III requirements that apply "to any other case in federal court," Chamber Amicus Br. 8, and eradicate the Fifth Circuit's flagrant departure from the rule that standing is not dispensed "in gross."

Here, the Fifth Circuit's rule allowed respondents to sue—and secure civil penalties—for *thousands* of CAA violation days, despite only being able to trace the injuries of their members to *five* emissions events, representing 44 violation days. Pet. 16-17. Respondents detail (at 7-9) the exposures and injuries claimed by two of their members from those 44 violation days. But respondents' standing to sue for those claimed injuries and violations is not at issue here. It's respondents' ability to sue for *thousands* of other violation days—with no allegations even trying to tie any alleged injuries to those violations—that is at issue in the first question presented. The *Cedar Point* rule grants respondents standing to pursue—and, as here, secure millions of dollars of penalties with respect to—those other violations in gross. And to make matters worse, respondents do not dispute that many of the "nuisance-type" injuries they claimed "could have been caused by … *other* companies' emissions" or even by entirely *legal* emissions. Pet. 25-26 (quoting App.537a).

Respondents argue (at 21) that there is no direct circuit conflict. But that is part of the problem—the *Cedar Point* rule has spread. Nevertheless, the sharp

legal disagreement over that rule evidenced by the battling en banc opinions below and by opinions in other decisions is striking. Two of the leading circuit-court decisions on the first question presented are deeply fractured, with separate opinions raising red flags about made-for-citizen-suits standing rules. *See Powell Duffryn*, 913 F.2d at 83 (Aldisert, J., concurring); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 164-65 (4th Cir. 2000) (three separate concurrences). And even *Cedar Point* itself candidly admitted that a "literal reading of [the traceability framework the Fifth Circuit adopted] may produce results incongruous with our usual understanding of the Article III standing requirements." 73 F.3d at 558 n.24. Indeed.

This case has only worsened the discord. Judge Oldham issued two separate panel-stage dissents articulating his disagreement with the Fifth Circuit's traceability rule. App.318a-26a, 278a-89a. And eight Fifth Circuit judges issued three comprehensive opinions at the en-banc stage further criticizing that standard. *Id.* at 97a-159a, 160a-73a, 174a-200a. The fact that this case alone has generated *five* opinions challenging the majority rule not only offers an uncommonly thorough examination of the precise question in this case, but also highlights the radical judicial disagreement on this issue.

Respondents' suggestion (at 15) that the en banc court's *per curiam* decision "resolved" the "instability in the law" is not serious. And their fallback position (at 28) that there is "every reason to believe" the full Fifth Circuit will soon "resolve the divisions among its judges" and revisit *Cedar Point* once and for all is equally absurd. The Fifth Circuit tried, and failed, to

end the *Cedar Point* experiment. This Court's intervention is now needed to rectify this abuse.

B. There Are No Barriers To Review

Tellingly, respondents devote most of their efforts to manufacturing a vehicle defect. That project fails.

1. Respondents first assert (at 16-17) that "[t]here is no precedential Fifth Circuit ruling for this Court to review" and "no legal rule on traceability for this Court to evaluate." Wrong, and wrong.

The en banc court's decision was *published*, making the decision—which permitted citizen-suit-plaintiffs to establish standing under circumstances Supreme Court precedent squarely forecloses—*precedential* under the Fifth Circuit's rules. 5th Cir. R. 47.5.4. Moreover, while perfunctory, that decision affirmed a district-court decision holding that plaintiffs had standing to pursue *thousands* of alleged violations under the *Cedar Point* rule. Pet. 13, 16-17, 19, 26. Everyone agrees the district court applied the *Cedar Point* rule, and that rule has governed in the Fifth Circuit for decades. *Id.* at 19; *see* BIO 16. The *Cedar Point* standard "drove the outcome in this case," Pet. 19, and indisputably remains the law in the Fifth Circuit, BIO 15. There is no question that this rule is before the Court here.

This case presents a clean opportunity to eradicate that rule. No one is asking this Court to "'review evidence,'" "'discuss specific facts,'" or "wade into 'the stipulated spreadsheet of violations.'" BIO 17 (citations omitted). Instead, petitioners are asking the Court to determine the correct legal standard for evaluating traceability for citizen suits. Pet. 24. If *Cedar Point* is wrong, then this Court would simply remand for the lower courts to apply the correct

standard, consistent with its customary practice. *See, e.g.*, *Groff v. DeJoy*, 600 U.S. 447, 473 (2023).

2. Respondents claim (at 18-20) that this Court would be "forc[ed]" to decide "novel antecedent disputes" if it grants the petition. That is incorrect.

Respondents' "antecedent" issues really boil down to one: To what must citizen-plaintiffs trace their injuries in order to sue for a past violation of an emission limit? *ETCL II* held that citizen-plaintiffs must trace their injuries to the past violation, albeit using the lax *Cedar Point* standard. App.297a-98a. But respondents—echoing Judge Davis's separate opinion below—make (at 18-20) the extravagant claim that citizen-plaintiffs need merely trace their injuries to a *future* violation of a limit to pursue *every* past violation of that limit. App.12a-34a.

Under that theory, respondents would be entitled to civil penalties for *all* 16,386 violation days alleged by respondents, not the 3,651 violation days that *ETCL II*, *ETCL III*, the district court's judgment, and *ETCL IV*'s affirmance of that judgment allowed. *See* App.3a-4a (Davis, J., concurring); App.133a (Jones, J., dissenting). Because adopting this position would significantly expand the lower court's judgment, respondents were required to file a cross petition to advance the theory before this Court. *See Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022). They didn't. Accordingly, respondents' so-called "antecedent" issues are off the table.

In any event, this alternative theory is baseless. As Judge Jones explained, respondents' "prospective" theory of standing lacks any "case law support[]"; "ignores the statutory authorization for CAA citizen suits," which mandates that plaintiffs "prove past

violations and penalties based on past violations"; and contradicts precedent from the Fifth Circuit and its "sister circuits." App.133a-40a. It also has startling implications. Respondents themselves "candidly acknowledge[d]" that, under their theory, "any individual who moves near a polluter [would have] immediate standing to sue that polluter for civil penalties premised on *every* violation that occurred *anytime* within the limitations period so long as the plaintiff can demonstrate that he faces certainly impending harm from an imminent future violation." App.138a (Jones, J., dissenting). That extreme theory of standing is way outside the bounds of Article III.

3. Last, respondents oddly claim that the petition "does not actually implicate the first question presented" because it did not fully quote *Cedar Point* and its "'causative nexus requirement'" verbatim. BIO 15-16 (citation omitted). But they ignore the question's "'could have' caused" language, which obviously subsumes this element. Pet i (citation omitted). And the petition itself makes clear that petitioners challenge the *Cedar Point* rule. Pet. 19 (explaining that *Cedar Point* "drove the outcome in this case"). So this objection fails, too.

II. The *Laidlaw* Question Warrants Review

On the second question presented, respondents simply double down on *Laidlaw*'s redressability rule, while ignoring the serious criticisms that have been leveled against that rule—beginning with Justices Scalia and Thomas in *Laidlaw* itself. Pet. 27.

1. Respondents' lead argument (at 29) is that petitioners "*conceded* that *Laidlaw*'s redressability holding is correct." That is false. Petitioners simply tried to align their arguments with *Laidlaw*; they

never conceded it was correct. And failing to ask a lower court to overrule this Court's precedent does "not suggest a waiver"; it reflects a "sound assessment that the argument would be futile." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007).

2. Respondents' assertion (at 29-30) that *Laidlaw* has not drawn "really any[] criticism" ignores the chorus of amici arguing that *Laidlaw* is "egregiously wrong as a matter of law" and "should be laid to rest." AmFree Amicus Br. 4, 10 (citation omitted); *see* Chamber Amicus Br. 20. Numerous others have criticized its redressability holding. *See, e.g.*, Harold J. Krent, Laidlaw*: Redressing the Law of Redressability*, 12 Duke Env't & Pol'y F. 85, 98 (2001). So have members of this Court, despite respondents' remarkable claim (at 30) to the contrary. Justice Thomas joined Justice Scalia's dissent in *Laidlaw* doing just that. And respondents' claim that "Judge Ho was the only judge below to suggest that [*Laidlaw*] be revisited," BIO 29, disregards Judge Oldham's conclusion that "redressability" is a "problem lurking in [this case]" because "[p]laintiffs do not receive any of the civil penalties; they all go to the U.S. Treasury," App.288a-89a n.3; *see id.* at 185a-86a n.3.

3. On the merits, respondents cannot dispute that "*Laidlaw*'s theory of redressability through the incidental effects of a fine upon deterrence is egregiously wrong." AmFree Amicus Br. 4. So they fall back on the other *stare decisis* factors. Starting with workability, they claim (at 31) that the decision provided adequate guidance to determine when the deterrent effect of a claim for civil penalties becomes so insubstantial that it cannot support redressability. Yet, as best petitioners can tell, no lower court has ever found *Laidlaw*'s redressability standard

*un*satisfied when a citizen-plaintiff seeks civil penalties for purportedly ongoing violations. *See* AmFree Amicus Br. 17. Instead, the analysis goes like this: Is the citizen-suit plaintiff seeking civil penalties? If yes, redressability is met. Pet. 31; *see* App.67a-68a. *Laidlaw* thus "abolishes redressability for citizen plaintiffs." AmFree Amicus Br. 17.

Respondents assert that the district court actually "thrice issued findings that the '[c]ivil penalties ... deter future violations.'" BIO 31 (alteration in original) (citation omitted). Not true. The district-court passage respondents cherry-pick simply states that "[c]ivil penalties in a CAA citizen suit satisfy the redressability requirement of standing because they deter future violations," citing *Laidlaw*. App.501a. All this shows is that the district court understood *Laidlaw* to be a categorical rule—which is part of the problem necessitating this Court's intervention.

Respondents also argue (at 31, 33) that the question of whether civil penalties can establish standing is a "policy argument" for Congress. That is circular, as the whole ballgame is whether Congress can confer Article III standing using unusual citizen-suit schemes in the first place—a question that falls squarely within this Court's purview, not Congress's. As Justice Scalia explained, it cannot. "In seeking to … giv[e] an individual plaintiff the power to invoke a public remedy, Congress [does] precisely what [this Court has] said it cannot do: convert an 'undifferentiated public interest' into an 'individual right' vindicable in the courts." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 204-05 (2000) (Scalia, J., dissenting) (citation omitted); *see* AmFree Amicus Br. 11-20.

Finally, respondents suggest (at 32) that *Laidlaw* is consistent with this Court's later decisions. Yet, as amicus AmFree explains (at 14-16), "*Laidlaw* has only become more of an outlier since it was decided." The Court should correct that mistake.

4. Taking a "nothing-to-see-here" approach, respondents relegate (at 33 n.14) the "grave Article II concerns" raised by *Laidlaw*, AmFree Amicus Br. 20, to a footnote—arguing that petitioners forfeited these arguments by not spelling them out in the question presented. That is incorrect. As both Justice Scalia's dissent in *Laidlaw* and the petition make clear, these Article II problems are inherent in *Laidlaw*'s flawed redressability rule. Pet. 30. In *Laidlaw*, this Court sidestepped Article II concerns because they "ha[d] not been argued" at the merits stage. 528 U.S. at 209 (Scalia, J., dissenting). They are squarely in play here. This case thus offers a prime opportunity to fully consider those concerns.

III. At A Minimum, The Court Should CVSG

If the Court does not grant the petition outright, it should call for the views of the Solicitor General.

Respondents argue (on 32) that a brief submitted by the Biden administration at the en banc stage reflects "the consistent view of the Executive Branch" that "*Laidlaw*'s redressability holding" is correct. That brief merely referred to "the reasoning of *Laidlaw*," CA5 U.S. Amicus En Banc Br. 25; it did not say it was correct. And far from uniformly accepting *Laidlaw*'s intrusion on Article II (as respondents suggest), the Executive has objected to several citizen-suit settlements, flagging the "'[d]ifficult and fundamental questions' that arise when private citizen groups exercise a power that the Constitution

commits to the Executive alone." U.S. Resp. to Enter Agreement 22, *United States v. DTE Energy*, No. 2:10-cv-13101 (E.D. Mich. July 8, 2020) (quoting *Laidlaw*, 528 U.S. at 197 (Kennedy, J., concurring)).

The Executive plays the primary role in enforcing the CAA, *see* 42 U.S.C. § 7413, and it has a vested interest in ensuring citizen-suit standing does not intrude on the Executive's power to enforce the laws. AmFree Amicus Br. 20. At the very least, the Court should call for the Solicitor General's views on the important questions presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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