No. 24-982

In the Supreme Court of the United States

EXXONMOBIL CORPORATION, *et al.*,
Petitioners,

v.

ENVIRONMENTAL TEXAS CITIZEN LOBBY, INC., *et al.*
Respondent.

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

BRIEF OF IOWA, WEST VIRGINIA, AND 25 OTHER STATES AS AMICI CURIAE SUPPORTING GRANTING THE PETITION

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QUESTIONS PRESENTED

1. Whether a plaintiff in a Clean Air Act ("CAA") citizen suit may satisfy Article III's traceability requirement merely by showing that she suffered the "kinds of injuries" that defendants' conduct "could have caused."

2. Whether this Court should overrule its holding, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 582 U.S. 167 (2000), that the availability of civil penalties paid to the government can satisfy Article III's redressability requirement for private, citizen-suit plaintiffs.

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INTEREST OF AMICUS CURIAE[1]

Amici curiae States of Iowa, West Virginia, and 25 other States ("amici States") submit this brief in support of Petitioners, ExxonMobil Corporation, *et al.*, urging this Court to reverse the Fifth Circuit's decision. That decision broadened standing for Clean Air Act ("CAA") citizen suits, allowing plaintiffs to establish standing simply by showing that their injuries are the "kinds of injuries" that defendants' conduct "could have" caused. App.308a. The Fifth Circuit also relied on *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000), to summarily conclude that plaintiffs satisfied Article III's redressability requirement based on the notion that civil penalties and injunctive relief alike can deter future violations. App.501a–02a.

Amici States have a strong interest here. The Fifth Circuit's decision allows private citizens to sue in federal court without making the traditional Article III showing that the defendant "likely caused" their injuries. It also applied *Laidlaw*'s "curious conclusion" that citizens have standing to seek civil penalties "even though any civil penalties won by the plaintiffs aren't actually paid to the plaintiffs" but to the U.S. Treasury. App.77a (Statement of Ho, J.).

The Fifth Circuit's decision upends the cooperative federalism enacted by Congress by drastically expanding Article III standing for environmental suits. That expanded standing disregards the States' longstanding historical role in environmental regulation. Congress has long recognized that historical role

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[1] Pursuant to Rule 37.2, amici provided timely notice of their intent to file this brief to all parties.

and woven it directly into the cooperative federalist framework of the Clean Air Act.

The Fifth Circuit's interpretation interferes with State authority over air quality and severely constrains congressionally approved State discretion over Clean Air Act enforcement. Beyond the constitutional indignity, the decision undermines State environmental innovation with little environmental benefit.

SUMMARY OF ARGUMENT

The Clean Air Act makes "the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The original Act—enacted in 1963—"was rooted in a strong presumption of unchallenged state primacy on regulating air pollution." Brigham Daniels, Andrew P. Follett, & Joshua Davis, *The Making of the Clean Air Act*, 71 Hastings L.J. 901, 908 (2020) (citing Pub. L. No. 88-206, 77 Stat. 392, 396 (1963)) ("[M]unicipal, State, and interstate action to abate air pollution shall be encouraged and shall not be displaced by Federal enforcement action except as otherwise provided.")).

Today, the Act still recognizes "that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(*a*)(3). And "[t]he basic framework for controlling air pollution since the enactment of the modern CAA in 1970 is one of cooperative federalism." Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 Nw. U. L. Rev. 1097, 1106 (2009).

Under the cooperative federalism model, "states are partners, if not leaders, when it comes to environmental statutes." Sen. Kevin Cramer, *Restoring*

States' Rights and Adhering to Cooperative Federalism in Environmental Policy, 45 Harv. J.L. & Pub. Pol'y 481, 500 (2022). Citizen-suit provisions under these laws are merely meant "to spur and supplement government enforcement." Courtney M. Price, *Private Enforcement of the Clean Water Act*, Nat. Resources & Env't, Winter 1986, at 31, 32. Citizen suits thus operate within the existing constitutional framework and are not meant to authorize suits beyond the bounds of Article III.

By ruling for the plaintiffs here, the Fifth Circuit drastically expanded Clean Air Act citizen suits—and did so based on a flawed interpretation of Article III principles. "The Clean Air Act's citizen-suit provision already "push[es] against the limits of Article III." *Env't Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 123 F.4th 309, 396 (Mem.) (2024) (Oldham, J., dissenting) (citing Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 805 (7th ed. 2015)). And the Fifth Circuit's decision "exacerbate[s] the constitutional tension" in these suits. *Id.*

"[T]he federal government cannot implement its air pollution program without the substantial resources, expertise, information, and political support of state and local officials." John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Md. L. Rev. 1183, 1224 (1995). But the Fifth Circuit's approach here would upset the Clean Air Act's "basic framework" of cooperative federalism that "has remained unchanged since the initial passage of the Act." Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act's Cooperative Federalism Framework is Useful for Addressing*

Global Warming, 50 Ariz. L. Rev. 799, 817 (2008). The Act explicitly recognizes that "Congress finds that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(*a*)(3).

Indeed, the Act expressly retains State authority, declaring that unless expressly provided, "nothing . . . shall preclude or deny" the rights of States to "adopt of enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." 42 U.S.C. § 7416(*d*); *see also id.* § 7412 (retaining State authority to regulate radionuclide emissions).

"The Clean Air Act thus provides a cooperative-federalism approach to air quality regulation." *Alabama Env't Council v. Adm'r, U.S. EPA*, 711 F.3d 1277, 1280 (11th Cir. 2013) (citation omitted). "This division of responsibility between the states and the federal government 'reflects the balance of state and federal rights and responsibilities characteristic of our federal system of government.'" *Luminant Generation Co. v. EPA*, 675 F..3d 917, 921 (5th Cir. 2012) (quoting *Fla. Power & Light Co. v. Costle*, 650 F.2d 579, 581 (5th Cir. 1981)). But an expansive reading of the citizen-suit provisions instead puts private actors in the driver's seat, directing compliance efforts toward mitigating litigation risk rather than toward the areas that state and local experts conclude are most in need of attention. *See* Gabriella Mahan, *Uncooperative Federalism: Citizen Suits, Savings Clauses, and Their*

Challenges to Negotiated Settlements, ABA Air Quality Committee Newsl., June 2018, at 3, 4.

The Fifth Circuit's decision thus threatens the Act's balance, but this Court can restore it. Here, the Court can ensure that the Clean Air Act citizen-suit standing is read through the proper cooperative federalist lens as provided in the Act's text.

ARGUMENT

I. COOPERATIVE FEDERALISM PRINCIPLES MUST DRIVE ANY INTERPRETATION OF THE CLEAN AIR ACT

Congress created a system of cooperative federalism for the States and federal government to complement each other's actions in protecting the environment. "The Clean Air Act was the first modern federal environmental statute to employ a 'cooperative federalism framework,' assigning responsibilities for air pollution control to both federal and state authorities." Doremus, et al., *supra* at 817. The Act "created the basic structure for air pollution control in the United States." Arnold W. Reitze, Jr., *Federalism and the Inspection and Maintenance Program Under the Clean Air Act*, 27 Pac. L.J. 1461, 1477 (1996). And with it, "Congress launched modern environmental 'cooperative federalism.'" Adam Babich, *Back to the Basics of Antipollution Law*, 32 Tul. Envtl. L.J.1, 41 (2018)

The cooperative federalism approach allows States to tailor federal regulatory programs to local conditions, promote competition within the federal regulatory framework, and allow experimentation with different approaches that might help find an optimal regulatory strategy. Phillip J. Weiser, *Federal*

Common Law, Cooperative Federalism, and Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1695–98 (2001). Indeed, the cooperative federalism approach is baked into the text of the Clean Air Act, and any interpretation which ignores cooperative federalism principles ignores critical historical and contextual context.

1. States possess a vital historical role in addressing air pollution.

Congress has long recognized "the states' role on the front lines" of air quality regulation. Babich, *supra* at 43. "Air pollution prevention falls under the broad police powers of the states, which include the power to protect the health of citizens in the state." *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000). And "[t]he problem of air pollution exists at the State and local level. That is where the public understands the problem." S. Rep. No. 95-127 at 10 (May 10, 1977) (accompanying S. 252), reprinted in Comm. on Public Works, 3 A Legislative History of the Clean Air Act Amendments of 1977, at 1371, 1384 (1978).

Indeed, "[d]espite the growth of federal environmental law"—particularly as to *interstate* air pollution—Congress has gone to great lengths to preserve an important role for the states in environmental policy-making." Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 Md. L. Rev. 1141, 1172 (1995). And "State law retains considerable importance in the environmental protection arena." *Id.*

The States have long held this vital role because different localities face different environmental challenges and different populations value different

environmental goals. For example, when Congress enacted the Clean Air Act, the "heavily industrial Rust Belt area, where the effects of pollution from the burning of coal were most pronounced" focused on "the harm to local public health caused by air pollution." Jason Scott Johnston, *A Positive Political Economic Theory of Environmental Federalization*, 64 Case W. Res. L. Rev. 1549, 1598 (2014). Meanwhile, the Southwestern States "were concerned about the effects on tourist demand for pristine air" and "in preventing the pollution of clean airsheds in undeveloped parts of the country." *Id.* And, today, States home to densely populated urban or industrialized areas face "[t]he most difficult air planning challenges." Reitze, *supra* at 1479; *see also* EPA, Map, 8-Hour Ozone Nonattainment Areas (2015 Standard), Green Book, (Feb. 28, 2025), *available at* https://perma.cc/2BK7-DYQT (showing areas subject to more stringent pollution-control regulations).

This "strong tradition of decentralized management" allows for "significant customization of standards" and allows States to tailor their standards based on the individual needs in their communities. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. Envtl. L.J. 179, 192–93 (2005). Thanks to this flexibility, States can experiment with different pollution-regulation methods and can quickly and efficiently respond to changes while quickly reversing or amending ineffective policies. *See* Henry N. Butler & Nathaniel J. Harris, *Sue Settle, and Shut Out the States: Destroying the Environmental Benefits of Cooperative Federalism*, 37 Harv. J.L. & Pub. Pol'y 579, 610 (2014).

States have embraced their environmental stewardship role with many State constitutions enshrining natural resource protections. *See, e.g.*, Iowa Const. art. VII, § 10 (creating a natural resources trust fund); Alaska Const. art VIII, § 2 (requiring that the legislature "provide for the . . . conservation of all natural resources"); Cal. Const. art. XIII, § 8 (protecting the "use or conservation of natural resources"); Mont. Const. art. II, § 3 (declaring the "right to a clean and healthful environment" for "all persons").

In fact, one fifth State constitutions enshrine clean air protections. *See, e.g.*, Fla. Const. art. II, § 7; La. Const. Art. IX, § 1; Mass. Const. art XCVII; Mich. Const. art. IV, § 52; Minn. Const. art. XI, § 14; N.M. Const. Art. XX, § 21; N.Y. Const. art. I, § 19; N.C. Const. art. XIV, § 5; Pa. Const. art. I, § 27; Va. Const. art. XI, § 1.

Many of those States declare conservation of air quality and air pollution abatement to be public policy concerns, requiring legislative action. *See*, *e.g.*, Fla. Const. art. II, § 7 ("Adequate provision shall be made by law for the abatement of air and water pollution."); Mich. Const. art. IV, § 52 ("The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction."); N.M. Const. Art. XX, § 21 (legislature "shall provide for control of pollution and control of despoilment of the air"); N.C. Const. art. XIV, § 5 (declaring policy of State "to control and limit the pollution of our air"); Va. Const. art. XI, § 1 (policy to ensure "that the people have clean air").

Massachusetts, New York, and Pennsylvania go even further, recognizing a right to "clean" and "pure"

air. Mass. Const. art. XCVII; N.Y. Const. art. I, § 19; Pa. Const. art. I, § 27.

And several States' constitutions put those commitments into action by establishing commissions or setting up funds to keep air and other natural resources clean. *See, e.g.*, Ark. Const. amend. 75 (creating Environmental Enhancement Funds); Minn. Const. art. XI, § 14 (creating permanent environment and natural resources trust fund for the "protection, conservation, preservation, and enhancement of the state's air . . . and other natural resources").

Both before and after the Clean Air Act's enactment, State laws and regulations thus have been "essential component[s] in the evolution of environmental policy." Dwyer, *supra* at 1185. And with decades "of environmental federalism under their belts, many states are sophisticated environmental players with as much or . . . more expertise than the EPA." Doremus, et al., *supra* at 825. As such, "[s]ome of the most innovative environmental protection legislation has been the product of state initiatives." Percival, *supra* at 1172–73 (citing California Initiative Measure of Nov. 4, 1986) (Proposition 65) (codified at Cal. Health & Safety Code § 25249.1 to .12 (West 1994)); Act of Sept. 2, 1983, ch. 330, 1983 N.J. Laws (codified at N.J. Stat. Ann. § 13:1K-6 to -35 (West 1992)); Mich. Comp. Laws Ann. § 324.1701 (1994)).

2. The Clean Air Act recognizes the States' air protection role, creating a cooperative federalism regime.

"The Clean Air Act largely preserves the traditional role of the states in preventing air pollution." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*,

498 F.3d 1031, 1042 (9th Cir. 2007) (citation omitted). Before 1955, air pollution regulation was the sole public health responsibility of the States, and States enacted various regulations pursuant to their historical police powers. *See* Arthur C. Stern, *History of Air Pollution Legislation in the United States*, 32 J. Air Pollution Control Ass'n 44, 44, 47 (1982); *(*discussing 1947 Cal. Stat. 1640; 1911 Iowa Acts 27; 1887 Minn. Special Laws 623).

The States' historical responsibility complements the Clean Air Act's philosophy "to encourage state, regional and local programs to control and abate pollution, while spelling out the authority of the national government to step into interstate situations with effective enforcement authority." Edmund S. Muskie, *The Role of the Federal Government in Air Pollution Control*, 10 Ariz. L. Rev. 17, 18 (1968). To be sure, outside the framework of the Clean Air Act, applying "the law of a particular State" to the issue of interstate air pollution "would be inappropriate." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011). But the Act leaves States plenty of breathing room.

Under the Clean Air Act, "[t]he primary federal roles are setting national air quality standards," while "[t]he primary state role is deciding how to achieve the federal air quality standards." Doremus, et al., *supra* at 817. States also retain the authority to set additional emission limits for certain pollution sources. *Id.* This "basic division of responsibility" in the Act "reflects the cooperative federalism principles that have long informed this nation's air pollution control laws." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 959 F.3d 1201, 1214 (9th Cir.

2020). Thus, the Act "provides a focused example of a modern program that operates at all levels of government, resulting from entwined governmental responsibilities." Reitze, *supra* at 1466. The Act thus is a "joint venture" between the States and federal government. *In re Volkswagen*, 959 F.3d at 1215 (citing *Gen Motors Corp.*, 496 U.S. at 532).

Under this State-federal partnership, the Clean Air Act authorizes the EPA to identify air pollutants and establish National Ambient Air Quality Standards. 42 U.S.C. §§ 7408–7409. States then bear "the primary responsibility" for implementing those standards" *Id.* § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within [its] entire geographic area."; *id.* § 7401(a)(3) ("[A]ir pollution prevention . . . is the primary responsibility of States and local governments.").

To implement national air quality standards, States must adopt and administer State Implementation Plans that meet certain statutory criteria. *Id.* § 7410. But States have "wide discretion in formulating [their] plan[s]." *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). States are "at liberty to adopt whatever mix of emission limitations [they] deem[] best suited to [their] particular situation," "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975).

Accordingly, States play the primary role in administering the Clean Air Act. 42 U.S.C. § 7401(a)(3). The Act limits the EPA's implementation role to the ministerial review of State plans for compliance with Act requirements. *See id.* § 7410(k)(3) ("[T]he [EPA]

Administrator shall approve [a State Implementation Plan or Plan revision] as a whole if it meets all the applicable requirements of this chapter."); *see also Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001) (the EPA's "overarching role is in setting standards, not in implementation"). This division of responsibility between the states and the federal government "reflects the balance of state and federal rights and responsibilities characteristic of our federal system of government." *Luminant Generation Co.*, 675 F.3d at 921–22 (citation omitted). Altogether, the Clean Air Act expects that the federal government can set targets, but the States can often determine the means of implementation—how the rubber meets the road.

Congress also intended that the States would take a key role in Clean Air Act enforcement. State Implementation Plans must provide for monitoring systems, set up permitting schemes, and "include a program to provide for the enforcement of the" emission-control measures. 42 U.S.C. § 7410(a)(2)(C); *see also id.* (a)(2)(B); (a)(2)(L). But, in limited circumstances, the Clean Air Act also permits citizen suits. *See* 42 U.S.C. § 7604.

Federalism concerns shape the citizen-suit section's scope. The Clean Air Act was the first environmental statute to incorporate a citizen suit provision, and "[a]lthough the citizen suit provision received bipartisan support . . . the provisions were not without their critics." Stephen Fotis, *Private Enforcement of the Clean Air Act and the Clean Water Act*, 32 Am. Univ. L. Rev. 127, 136, 146 & n.96 (1985) (citation omitted). "The legislative history of the CAA's groundbreaking citizen suit provision reveals that its opponents, both in the Congress and in the industry, feared

that the new avenue of litigation would engender abuse." *Id.* at 146–47.

For example, some members of Congress feared that the provisions would cause an explosion of questionably meritorious lawsuits—no matter how well the EPA performed its enforcement duties. *See* 116 Cong. Rec. 33, 102 (1970) (statement of Sen. Griffin); 116 Cong. Rec. 32,925–26 (1970) (statement of Sen. Hruska). Those members worried that the extra suits "would clog an already congested court system." Fotis, *supra* at 147. Industry representatives "predicted that a multiplicity of suits would interfere with the EPA's prosecutorial discretion, thus leading to unfairness, inequality, and inconsistency in enforcement." *Id.* (citation omitted). "[B]oth those in Congress and in the industry feared that citizens would bring frivolous and harassing suits." *Id.* (citing 116 Cong. Rec. 32,925-26 (1970) (statement of Sen. Hruska); Air Pollution - 1970, Part 5: Hearings before the Subcomm. on Air and Water Pollution of the Comm. on Public Works, United States Senate on S. 3229, S. 3466, S. 3546, 91st Cong., 2d Sess. 1583–90 (1970)).

The Clean Air Act thus contains several limitations on citizen suits. *First*, the Clean Air Act requires a would-be litigant to send notice of his intent to sue to the EPA Administrator, the State in which the violation allegedly occurred, and the alleged violator. 42 U.S.C. § 7604(b)(1)(A). The law then precludes the citizen from suing for sixty days, during which, EPA or State may decide to file suit on its own. *Id. Second*, the Act bars citizen suits when government enforcement is underway. *Id.* § 7604(b)(1)(B).

"In summary, Congress carefully drafted a citizen suit provision to encourage public enforcement of

the CAA . . . statutory requirements without the risk of abuse by venal citizens." Fotis, *supra* at 155. But Congress "did not empower citizens to act as private attorneys general without limit," *id.*, and overly expansive interpretation of the Clean Air Act standing would risk doing just that.

II. FEDERALISM PRINCIPLES UNDERLIE ANY CLEAN AIR ACT INTERPRETATION.

Even if Congress had not written cooperative federalism into the Clean Air Act, the principles of statutory construction also favor reading the Act through a State-protective lens. Under the nation's federalist system, "States are not mere political subdivisions of the United States," and "State governments are neither regional offices, nor administrative agencies of the federal government." *New York v. United States*, 505 U.S. 144, 188 (1992).

The Constitution instead "leaves to the several States a residuary and inviolable sovereignty." The Federalist No. 39, at 245 (C. Rossiter ed. 1961). "The Framers concluded that allocation of powers between the National Government and the States enhances Freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived." *Bond v. United States*, 564 U.S. 211, 221 (2011). This allocation of powers "preserves the integrity, dignity, and residual sovereignty of the States." *Id.* Federalism also secures to citizens the liberties that derive from the diffusion of federal power." *New York*, 505 U.S. at 181 (citation and internal quotation marks omitted).

The cooperative federalism framework in particular "necessarily implies that states may reach differing conclusions on specific issues relating to the implementation of the Act. *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 281 (5th Cir. 2010) (citing *Global Naps, Inc. v. Mass. Dep't of Telecomms. & Energy*, 427 F.3d 34, 46 (1st Cir. 2005)). "Far from being a bug, a patchwork of state-by-state implementation rules is a feature of this system of cooperative federalism." *Id.*

This Court has consistently understood that "[t]he States unquestionably do retai[n] a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred them to the Federal Government." *New York*, 505 U.S. at 156 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)). Courts thus "begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

For example, in *McDonnell v. United States*, this Court declined to construe a criminal statute "in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of good government for local and state officials." 579 U.S. 550, 576–77 (2016) (citation and internal quotation marks omitted). This Court instead chose a "more limited interpretation" that was both textually supported and free of "federalism concerns." *Id.*

And when interpreting statutes designed to advance cooperative federalism in particular, this Court "ha[s] not been reluctant to leave a range of

permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims." *Wisconsin Dep't of Health & Fam. Servs. v. Blumer*, 534 U.S. 473, 495 (2002).

If Congress "wishes to significantly alter the balance between federal and state power," the Court "require[s] Congress to enact exceedingly clear language." *Sackett*, 598 U.S. at 679 (quoting *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 621–22 (2020)) (internal quotation marks omitted). This clear-statement rule recognizes that Congress's ability to "legislate in areas traditionally regulated by the States" is an "extraordinary power in the federalist system," so courts "must assume Congress does not exercise [that power] lightly." *Gregory*, 501 U.S. at 460. As such, Congress must use "unmistakably" clear language that places its intent beyond dispute. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). Without such language, statutes "will not be deemed to have significantly changed" the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 n.16 (1971). The requirement holds additional force under the Clean Air Act given the Act's express policy that each State holds the "primary responsibility for assuring air quality within [its] entire geographic area." 42 U.S.C. § 7401(a)(3).

Layering these federalism principles over the text of the Clean Air Act and the States' historical role in air quality regulation establish why courts should avoid the constitutional and federalism questions that overly broad citizen suit standing would create.

III. THE FIFTH CIRCUIT'S RULING DISRUPTS THE COOPERATIVE FEDERALISM BALANCE OF THE CLEAN AIR ACT.

The Fifth Circuit stripped federalism principles and historical context from its interpretation. Its expanded view of the Clean Air Act citizen-suit standing frustrates core federalism principles by replacing State primacy in Clean Air Act enforcement with unelected and unchecked citizen plaintiffs.

Too-broad citizen-suit regimes, like those here, undermine federalism and frustrate the States' and Congress's priorities. Cooperative federalism gives States discretion and creative latitude. *Budget Prepay*, 605 F.3d at 281. But the fear of overzealous citizen suits prevents States from experimenting with regulatory approaches. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). Indeed, "citizen enforcement may not be an effective means of ensuring the most efficient implementation of environmental laws," and "[i]n some cases, environmental suits may even frustrate the objective of environmental protection." Frank B. Cross, *Rethinking Environmental Citizen Suits*, 8 Temp. Envt'l L. & Tech. 55, 64 (1989).

1. The Fifth Circuit's interpretation undermines federalist principles.

Federalism is not just an end in itself: Rather, the federalist structure "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society[,] increases opportunity for citizen involvement in the democratic processes[,] allows for more innovation and experimentation in government[, and] makes government more

responsive by putting States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458 (citations omitted).

Under the cooperative federalism system, "[i]f state residents would prefer their government devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program." *New York*, 505 U.S. at 168. States also have the option to supplement the federal program to the extent State law is not preempted. *Id.*

Either way, "[w]here Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences[, and] state officials remain accountable to the people." *Id.* For example, one State in a heavily industrialized area might prioritize "cleaning up fouled airsheds" while another might be concerned "not with dirty air, but with clean air" and keeping local airsheds pristine. *See* Johnston, *supra* at 1598. In other words, "the state may prefer protecting the environment one way to protecting it another way." *Sierra Club v. U.S. Army Corp. of Eng'rs*, 909 F.3d 635, 648 (4th Cir. 2018). Cooperative federalism allows States to take different approaches provided they still satisfy the baseline federal standards.

But expanded citizen suits interfere with those State decisions. These suits thus take the federalism concerns already present in administrative law, Scott A. Keller, *How Courts Can Protect State Autonomy from Federal Administrative Encroachment*, 82 S. Cal. L. Rev. 45, 94 (2008), and multiply them hundredfold. Where, as here, a court grants citizen plaintiffs broad

enforcement authority, it creates an army of "private attorneys general," who lack the institutional concerns and built in checks that could temper even a federal agency. *See* Charles S. Abell, *Ignoring the Trees for the Forests: How the Citizen Suit Provision of the Clean Water Act Violates the Constitution's Separation of Powers Principle*, 81 Va. L. Rev. 1957, 1964 (1995). Unlike government enforcers, "[c]itizen-suit plaintiffs . . . face no significant political repercussions for setting unwise enforcement priorities," allowing them to pursue even "technical" violations of state-law conditions that go beyond the EPA. Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 Duke Env't L. & Pol'y F. 39, 43, 49–50, 56–57, 62 (2001). Making matters worse, the diligent-prosecution bar—under which citizens cannot proceed when a state government is "diligently prosecuting" the same violator—places federal courts in the "uncomfortable, if not institutionally incompetent" position of "delving in [the state's] eventual aims and effort" in pursuing polluters. Peter A. Appel, *The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation*, 10 Widener L. Rev. 91, 103 (2003).

These concerns help explain why Congress's approach to this "private [environmental] law enforcement" shows "a vague sense of suspicion and discomfort" with the citizen suit mechanism. Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 Tul. L. Rev. 339, 342 (1990). Statutory limitations to citizen suits, such as the sixty-day notice requirement and government enforcement bar to suit are the result of this suspicion. Fotis, *supra* at 154–155. "Citizen suits were intended by Congress to be an adjunct to governmental enforcement priorities, not to

supplant them." *Envt. Texas Citizen Lobby, Inc.*, 123 F.4th at 358 (Jones, J., dissenting) (citing *Gwaltney*, 484 U.S. at 60); *see also* Abell, *supra*, at 1961–62 ("limitations on citizen involvement" are "designed to ensure that citizen suits play a supplementary, and not a superseding, role in the enforcement" of the Act). In addition, all civil fines that a citizen suit obtains are payable to the United States Treasury. 42 U.S.C. § 7604(a). This prohibition on profitable citizen enforcement "would be inexplicable if Congress considered private enforcement wholly unproblematic." Greve, *supra*, at 342.

Congressional limits thus ensure that citizen suits "are only proper when the federal state, or local agencies fail to exercise their enforcement responsibility, and that such suits should not considerably curtail the governing agency's discretion to act in the public interest." *Arkansas v. Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). Indeed, the Clean Air Act's overarching cooperative-federalism regime means little without clear citizen suit limitations. Yet the Fifth Circuit undermines these principles by removing a key jurisdictional limitation, upending this delicate balance.

2. The Fifth Circuit's interpretation stifles State environmental protection efforts.

Overly broad Article III standing further frustrates core federalism tenets by hampering regulatory innovation. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285

U.S. 262, 311 (1932) (Brandeis, J., dissenting). Federalism recognizes "the political reality that a smaller unit of government is more likely to have a population with preferences that depart from the majority's. So it is more likely to try an approach that could not command a national majority." Michael W. McConnell, *Federalism: Evaluating the Founders' Design for Federalism*, 54 U. Chi. L. Rev. 1484, 1498 (1987). Put simply: "Lower levels of government are more likely to depart from established consensus simply because they are smaller and more numerous." *Id*. This means that "[i]f innovation is desirable, it follows that decentralization is desirable." *Id.* As such, "local laws can be adapted to local conditions and local tastes, while a national government must take a uniform–and hence less desirable approach." *Id.* at 1493. This flexibility also gives local governments "greater opportunity and incentive to pioneer useful changes." *Id.* That is one reason why "[t]he EPA's regulations are drafted to be applied with discretion." Cross, *supra*, at 66.

But expanded citizen suits "run the risk of inconsistent and unfair enforcement, as citizens may pursue even small and unavoidable violations" of environmental statutes. Cross, *supra*, at 66.

Some environmentalists might not see the harm in overenforcement and might even find it beneficial, but "we should ask whether more litigation over technical violations and aesthetic harms serves the broader goals of cleaner air, purer water, and the safeguarding of the natural world." Adler, *supra* at 82

Citizen suits also come at considerable taxpayer expense as litigation expenses can divert funds from essential government services. *See* Susan A. Macmanus, *The Impact of Litigation on Municipalities:*

Total Cost, Driving Factors, and Cost Containment Mechanisms, 44 Syracuse L. Rev. 833, 840–41 (1993). Indeed, citizen suits have sometimes been pursued against the States themselves, even though such efforts are "profoundly contrary to the Act's remedial design." *Sierra Club v. Korleski*, 681 F.3d 342, 352 (6th Cir. 2012) (Sutton, J.).

Perhaps the policy could be justified if citizen suits somehow enhanced air quality or reduced air pollution, but increased citizen suits do not have that effect. "While some citizen suits are no doubt motivated by pure intentions, and some certainly produce tangible environmental gains, it is not clear how much environmental benefit citizen-suit provisions actually provide." Adler, *supra*, at 51.

It might seem natural to assume that more citizen suits mean more environmental protection, "[u]nfortunately, citizen enforcement may not be an effective means of ensuring the most efficient implementation of environmental laws[, and] . . . may even frustrate the objective of environmental protection." Cross, *supra*, 64. That is because citizen plaintiffs do not face the same political and economic constraints that might limit government enforcement. Adler, *supra*, at 51. Instead, "citizen-suit provisions encourage the filing of suits against vulnerable plaintiffs irrespective of the environmental benefit." *Id.* at 51. And "[e]nvironmental citizen suits facilitate and encourage litigation over paperwork violations and permit exceedences, which may or may not impact environmental quality." *Id.* at 58.

Indeed, "[t]here is a growing consensus in environmental law that environmental regulations can better achieve their goals if they are more flexible."

Adler, *supra*, at 66 (citing Karl Hausker, *Reinventing Environmental Regulation: The Only Path to a Sustainable Future*, 29 Envtl. L. Rep. 10, 148 (March 1999)). The Fifth Circuit's result removes that flexibility and instead "effectively usurps federal, state, and local environmental enforcement decisions." *Envt. Texas Citizen Lobby, Inc.*, 123 F.4th at 358 (Jones, J., dissenting). The cooperative federalism woven into the Clean Air Act is meant to avoid just such a result.

CONCLUSION

This Court should grant *certiorari* to reverse the Fifth Circuit Court's judgment.

Respectfully submitted,

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