No. 17-20545

In the United States Court of Appeals for the Fifth Circuit

ENVIRONMENT TEXAS CITIZEN LOBBY, INCORPORATED;
SIERRA CLUB,

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Texas, Houston Division
No. 4:10-cv-4969

EN BANC BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: April 26, 2023

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION

Citizen suits, like all lawsuits, require the plaintiff to establish the existence of a "case" or "controversy" within the meaning of Article III of the Constitution—nothing more; nothing less. This requirement ensures that courts respect their "proper—and properly limited—role" in our tripartite form of government. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Plaintiffs here do not dispute this. Nor do they argue, as Exxon insinuates, "that the ordinary rules of standing should be relaxed in citizen-suit litigation," Appellants' En Banc Br. 32. Rather, it is Exxon that, disagreeing with Congress's decision to authorize private enforcement of the Clean

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief. A motion requesting leave to file has been docketed herewith.

Air Act and other environmental statutes, asserts that citizen suits require "special vigilance," *id.* at 33, and asks this Court to adopt novel standing rules for this and other citizen-suit cases. Neither history nor the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), support that request. Indeed, to accede to it would be to engage in precisely the sort of judicial activism that standing doctrine is supposed to guard against.

Statutes authorizing private enforcement to supplement the government's efforts to protect the public welfare have existed for hundreds of years. The citizen suit's historical predecessor, the *qui tam* action, dates all the way back to thirteenth-century England. Though born at common law as a means for gaining entry to the esteemed royal courts, *qui tam* actions promptly evolved into creatures of statute as Parliament recognized the utility of harnessing private citizens to aid in enforcing the law and began passing law after law with *qui tam* provisions. By the time of the Founding, statutory *qui tam* actions were well established, and early state legislatures and the first Congresses passed countless laws authorizing *qui tam* prosecutions or containing "informer" provisions designed to incentivize private citizens to aid the government in ensuring that laws protecting the public welfare were obeyed.

As one scholar has remarked, "if the stranger suit was thought constitutionally problematic, in all probability some constitutional concern would have been voiced

about the qui tam action or the informers' action." Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 176 (1992). Yet there is no Founding-era evidence of anyone questioning these suits on the grounds that they either infringed Article II or violated separation of powers principles more broadly. This is so even though relators in *qui tam* actions suffer no injury of their own (unlike citizen-suit plaintiffs), but acquire standing through "assignment of the Government's damages claim." *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000) (Scalia, J.). The Supreme Court has embraced the relevance of this history, finding it "well nigh conclusive with respect to the question . . . whether *qui tam* actions were 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Id.* at 778 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998)).

Thus, contrary to Exxon's argument that citizen suits "infring[e] Article II and the powers constitutionally entrusted to the Executive," Appellants' En Banc Br. 32, citizen suits from their inception were designed by Congress as a complement to the executive branch's law enforcement efforts based on the judgment that such private assistance is necessary in certain areas of law. To artificially limit citizen suits as Exxon requests would thus infringe on the separation of powers in a different way: allowing courts to nullify Congress's express choice to authorize such suits.

The Supreme Court's decision in *TransUnion* does not alter this analysis. *TransUnion* addressed the *types* of harms that constitute concrete injuries for purposes of Article III standing. The Court held that only those harms with "a close historical or common-law analogue" can confer standing and that Congress cannot change this standard even where it expressly creates private rights. *TransUnion*, 141 S. Ct. at 2204. *TransUnion* did not call into question those statutes like the Clean Air Act which do not even purport to create private rights but simply give private citizens a cause of action to sue when they suffer a separate and distinct injury. Indeed, *TransUnion* blessed such statutes, making clear that "[c]ourts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *Id.*

Accordingly, when the Court in *TransUnion* discussed the risk of infringement on Article II, it was not expressing concern about statutes like the Clean Air Act that authorize citizen suits as a complement to government enforcement. Rather, the Court was expressing concern about a situation in which plaintiffs who had not suffered "harms traditionally recognized as providing a basis for lawsuits in American courts," *id.*, might attempt to usurp the executive's broader law enforcement role. *See id.* at 2207. At the same time, the Court made clear that "traditional tangible harms, such as physical harms" like Plaintiffs assert here,

"readily qualify as concrete injuries under Article III" and thus do not risk the sort of infringement on Article II that the Court sought to mitigate. *Id*. at 2204. Tellingly, nowhere in Exxon's brief does it argue that the types of injuries that Plaintiffs suffer in this case are not cognizable under *TransUnion*'s historical-analogue test. That should end the matter.

But even if this Court were to entertain Exxon's argument that *TransUnion* did more than opine on the *types* of injuries that are judicially cognizable, the case still has no application here, let alone the "profound implications for environmental citizen suits" that Exxon claims, Appellants' En Banc Br. 36. Critically, unlike *TransUnion*, which involved a group of class action plaintiffs suing for "actual damages" under the Fair Credit Reporting Act, 15 U.S.C. § 1681n(a)(1)(A), this case involves two organizational plaintiffs who claim associational standing to sue for civil penalties under the Clean Air Act to deter ongoing and future harms. As a result, Plaintiffs are required to prove only that "any one" of their members had standing in his or her own right, *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977) (quotation marks omitted), and the standing analysis must be forward-looking, as opposed to "retrospective," as in *TransUnion*, 141 S. Ct. at 2210; *see also id.* (explaining that when a plaintiff seeks relief that is prospective in nature, demonstrating a "material risk of future harm" caused by the defendant is sufficient). This means that to demonstrate traceability, Plaintiffs do not need to

"connect the exact time of their injuries with the exact time of an alleged violation," *Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 793 (5th Cir. 2000), as that approach orients the traceability analysis in the wrong direction. Instead, Plaintiffs simply need to demonstrate that Exxon's violations contribute—at least in part—to their ongoing and imminent injuries. *See Sierra Club v. Cedar Point*, 73 F.3d 546, 557 (5th Cir. 1996). They have met that burden.

In sum, this Court should not countenance Exxon's call for "special vigilance," Appellants' En Banc Br. 33, in the form of heightened standing requirements for citizen suits. To do so would subvert Congress's authority to create private causes of action, undermining the Supreme Court's repeated warnings, including in *TransUnion* itself, that courts must be highly attuned to "the idea of separation of powers" when assessing a plaintiff's standing to sue. *TransUnion*, 141 S. Ct. at 2203 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)). If Exxon is upset that private citizens have taken a stand to protect their own physical safety and limit the Baytown Complex's persistent violations of the Clean Air Act, it should take that up with Congress—the institution that authorized citizen suits in the first place—rather than asking this Court to effectively nullify provisions of the law that Congress passed.

ARGUMENT

I. Deeply Rooted in English and American Legal History, Citizen Suits and Their Historical Predecessors Were Uncontroversial at the Founding.

Although citizen suits in their modern form did not gain prominence until the twentieth century, *see TransUnion*, 141 S. Ct. at 2206 n.1, statutes authorizing private parties to enforce laws protecting the public welfare have existed for centuries, making the citizen suit part of a "long tradition," *Vermont Agency*, 529 U.S. at 774, stretching back "at least 600 years in Anglo-American law," Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement*, 34 Buff. L. Rev. 833, 835 (1985). According to the Supreme Court, this historical pedigree is "particularly relevant to the constitutional standing inquiry," *Vermont Agency*, 529 U.S. at 774, as "matters that were the traditional concern of the courts at Westminster" are "the staple of judicial business," *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

The citizen suit's historical predecessor, the *qui tam* action, first emerged in England during the thirteenth century. *Vermont Agency*, 529 U.S. at 774. Short for "*qui tam pro domino rege quam pro seipso*," which literally means "he who as much for the king as for himself," *qui tam* actions originated at common law, where they were used as a means to gain access to the esteemed royal courts. 3 William Blackstone, *Commentaries on the Laws of England* *160 (1768). Because those

courts typically only heard matters involving the king, *see* F.C. Milsom, *Trespass from Henry III to Edward III, Part III: More Special Writs and Conclusions*, 74 L.Q. Rev. 561, 585 (1958), commoners would allege royal interests in addition to their own private interests to "obtain a common law remedy . . . for a private wrong that also affected the king[]," Note, *The History and Development of Qui Tam*, 1972 Wash. U. L. Q. 81, 85 (1972); *see, e.g.*, *Prior of Lewes v. Master Roger de Holt* (1300), *reprinted in Select Cases in the Exchequer of Pleas*, 48 *Selden Society* 198 (1931) (asserting king's interest in lands held under royal tenure); *Rex et John Gobbard v. Hanville* (undated), *reprinted in* 48 *Selden Society*, *supra*, at 215 (asserting interest in safety of the king's men). This practice, however, was short-lived. By the start of the fourteenth century, due to both the expansion of the royal courts' jurisdiction to cover all legal disputes (rendering unnecessary the technique of asserting royal interests to get into a preferred forum), as well as Parliament's enactment of a slew of new laws expressly providing for *qui tam* suits, the common-law *qui tam* action was largely displaced by *qui tam* actions expressly authorized by statute. *Vermont Agency*, 529 U.S. at 775.

These new statutes took a variety of different forms. Many permitted injured parties to sue to vindicate their own interests as well as the Crown's. *See, e.g.*, A Remedy for Him Who Is Wrongfully Pursued in Admiralty Court, 2 Hen. 4, c.11 (1400). Others permitted informers to obtain a bounty for their information even in

the absence of an injury, *see, e.g.*, Statute Prohibiting the Sale of Wares After Close of Fair, 5 Edw. 3, c.5 § 6 (1331), under the rationale that "every offence, for which such action is brought, is supposed to be a general grievance to every body." 2 William Hawkins, *A Treatise of the Pleas of the Crown* 380 (1787); *see* 3 Blackstone, *supra*, at *160 ("such actions . . . are given to the people in general"). Regardless of form, Parliament viewed statutory *qui tam* actions as critical tools for effectuating its will, as they "vastly expanded law enforcement resources and greatly increased the likelihood that [a violator of the law] would be caught, all at no cost to the government apart from the contingent promise of [a portion] of any penalties recovered." Randy Beck, *Qui Tam Litigation Against Government Officials: Constitutional Implications of a Neglected History*, 93 Notre Dame L. Rev. 1235, 1255 (2018).

This notion of the *qui tam* action—as a vital supplement to government law enforcement—made its way across the Atlantic, where "[*q*]*ui tam* actions appear to have been as prevalent . . . as in England, at least in the period immediately before and after the framing the Constitution," *Vermont Agency*, 528 U.S. at 776. And just as in England where, by that point, the statutory *qui tam* action had gained prominence and its common-law ancestor had fallen into disuse, the *qui tam* action and closely related informers' action were creatures of statute from their inception in the United States. *See Marvin v. Trout*, 199 U.S. 212, 225 (1905) (noting that

such statutes "have been in existence . . . in this country since the foundation of our government"); Note, *supra*, at 94 ("No evidence has been found of a common law *qui tam* suit in [early American] history," but there are "numerous examples of statutory *qui tam*" actions).

Legislatures in the new Republic took various approaches to crafting *qui tam* statutes. Initially, many colonies adopted English *qui tam* statutes wholesale or with minor modifications. *See, e.g.*, New Jersey Gaming Law, Act of Feb. 8, 1797, §§ IV, V (1800) N.J. Laws 224-25 (repealed 1847) (adopted from the English Gaming Law, 9 Anne, c.14, § 2 (1710)); *State v. Bishop*, 7 Conn. 181 (1828) (describing the Miller's Toll statute in colonial Connecticut, taken directly from England). The first Congresses expanded upon that approach, enacting both statutes with British origins and wholly original ones, largely out of "fear[] that exclusive reliance upon federal law enforcement machinery would not suffice to enforce the penal laws of the nation." Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 Am. U. L. Rev. 275, 303 (1989). Laws enlisting citizens in penal law enforcement thus covered a wide range of subjects, "including those criminalizing the import of liquor without paying duties, prohibiting certain trade with Indian tribes, criminalizing failure to comply with certain postal requirements, and criminalizing slave trade with foreign nations." Sunstein, *supra*, at 175

(footnotes omitted).[2] Such statutes grew so common in the new Republic that by the turn of the nineteenth century, as Chief Justice Marshall noted, "[a]lmost every fine or forfeiture under a penal statute, [could] be recovered by an action of debt as well as by information." *Adams v. Woods*, 6 U.S. 336, 341 (1805).

As in England, many early American statutes also provided financial incentives that encouraged citizens to act as "informers" or "relators," thus authorizing private parties who were in the best position to discover illegal behavior to "don the mantle of a public prosecutor." Krent, *supra*, at 297, 300. For instance, the 1863 False Claims Act had "the principal goal of stopping the massive frauds perpetrated by large [private] contractors during the Civil War," *Vermont Agency*, 529 U.S. at 781 (quotation marks omitted), and "[t]he idea behind the provision was that individuals within the entity defrauding the government would have superior knowledge of fraud over that of the Department of Justice," Gretchen L. Forney, *Qui Tam Suits: Defining the Rights and Roles of the Government and the Relator Under*

[2] *See also, e.g.*, Act of July 31, 1789, § 29, 1 Stat. 29, 44-45 (regarding duties and their rates and fees); Act of Sept. 1, 1789, § 21, 1 Stat. 55, 60 (following provisions of Act of July 31, 1789 regarding "penalties and forfeitures"); Act of Mar. 1, 1790, § 3, 1 Stat. 101, 102 (regarding filing of census forms); Act of July 20, 1790, § 1, 1 Stat. 131, 131 (regarding contracts with mariners and seamen); *id.* § 4, 1 Stat. at 133 (regarding harboring runaway seamen); Act of July 22, 1790, § 3, 1 Stat. 137, 138 (regarding trade with Indians); Act of Feb. 25, 1791, § 8, 1 Stat. 191, 196 (regarding the Bank Act); Act of Mar. 3, 1791, § 44, 1 Stat. 199, 209 (regarding the Distilled Spirits Act); Act of Feb. 20, 1792, § 25, 1 Stat. 232, 239 (regarding the Post Office Act); Act of May 19, 1796, § 18, 1 Stat. 469, 474 (regarding trade with Indian tribes).

the False Claims Act, 82 Minn. L. Rev. 1357, 1364 (1998). In fact, one of the two earliest federal informers' statutes operated against both private violators and executive officials, *see* Act of July 31, 1789, ch. 5, § 29, 1 Stat. 29, 45, demonstrating Congress's view that such statutes could serve both as supplements to federal law enforcement and as standalone mechanisms for protecting the public welfare when the defendant was the government itself.

Critically, despite the ubiquity of statutes enlisting private parties in law enforcement at the Founding—and of cases analyzing and applying those statutes—there is no record of early American jurists questioning these private enforcement actions as undermining the Constitution's separation of powers, and "no evidence that anyone at the time of the framing believed that a qui tam action or informers' action produced a constitutional doubt." Sunstein, *supra*, at 176; *see* Stephen L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 Stan. L. Rev. 1371, 1409 (1988) (these suits "were not viewed as raising constitutional problems"). To the contrary, "Chief Justice John Marshall, like other early federal judges to rule on such cases, blessed qui tam and informer actions," Dan L. Hargrove, *Soldiers of Qui Tam Fortune*, 34 Pub. Cont. L.J. 45, 52 (2004) (citing *Adams*, 6 U.S. at 336; *United States v. Simms*, 5 U.S. 252 (1803); *Ketland, qui tam v. The Cassius*, 2 U.S. 365 (C.C.D. Pa. 1796); *Evans, qui tam v. Bollen*, 4 U.S. 342 (C.C.D. Pa. 1800)), and statutes authorizing these sorts of actions were liberally

construed, *see, e.g.*, *Adams*, 6 U.S. at 340-41 (interpreting statute providing award for informer as authorizing him to sue); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943) (describing the Founding-era rule that "[s]tatutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the action are construed to authorize him to sue"). When defendants in these cases urged the Supreme Court to artificially limit informer statutes, the Court refused to do so: "Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the criminal statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours." *Id.* at 542.

Rather than fearing that private informers would infringe on executive authority, the chief concern in the early United States was that vexatious informers would bring unwarranted cases to line their own pocketbooks, given that many informer statutes included financial incentives. Note, *supra*, at 97. Accordingly, the first Congresses and early state legislatures built safeguards into laws authorizing private enforcement such as strict venue statutes, *e.g.*, 1860 Mass. Rev. Stat. 621, ch. 23, § 8, short statutes of limitations, *see, e.g.*, *Commonwealth v. Frost*, 5 Mass. 53, 58 (1809) (applying 1788 Massachusetts statute imposing one-year statute of limitations on certain informers' actions), and fines for informers who engaged in wrongdoing themselves, *see, e.g.*, *Haskins v. Newcomb*, 2 Johns 405, 408 (N.Y. Sup.

Ct. 1807) (discussing New York statute authorizing a $100 fine against informers who "compound or agree with the offender for the offence alleged to be committed").

These textual constraints written into Founding-era private enforcement statutes served as the primary means of keeping vexatious informers at bay. *See* Note, *supra*, at 97-98. Though courts did occasionally take on a more active policing role, they did so in manners that still honored the legislative decision to authorize private enforcement in the first place. For instance, in criminal cases in which public and private individuals were authorized to prosecute jointly, some courts took responsibility for coordinating that effort throughout the litigation, *see* Boyer & Meidinger, *supra*, at 955, ensuring "that a public prosecution for a criminal offense [did] not degenerate into . . . the gratification of private malice," *Thalheim v. State*, 38 Fla. 169, 183-84 (1896). And in jurisdictions that barred private prosecution of criminal cases, courts looked to the text of the statute—its procedures, penalties, and the specific conduct prohibited—to discern whether a statute was in fact criminal in nature and could not give rise to a case brought by a private party. *See* Note, *supra*, at 99 & n.102.

Founding-era courts did not, however, invent atextual rules to effectively nullify the legislative choice to authorize private enforcement in historical antecedents to citizen-suit statutes. And there is no evidence that the absence of such

judicially imposed constraints caused problems. To the contrary, "[w]hile English history suggests that private regulatory enforcement can lead to abuses and backlash, the American experience indicates that this is not an inevitable result." Boyer & Meidinger, *supra*, at 954.

Finally, although *qui tam* relators, unlike citizen-suit plaintiffs, receive a bounty if the suit is successful, the history of *qui tam* actions is no less relevant here because of this difference. Indeed, the Supreme Court has expressly rejected the argument that it is the interest in this bounty which gives *qui tam* relators standing, *Vermont Agency*, 529 U.S. at 772-73, holding instead that *qui tam* relators derive their standing from stepping into the shoes of the United States, *id.* at 773 (*qui tam* relators have standing as "assignees" to "assert the injury in fact suffered by the assignor" of the claim, *i.e.*, the federal government). In contrast, citizen-suit plaintiffs have no need to step into the shoes of the federal government, as they assert their own injury that stems directly from the unlawful conduct of the defendant. Thus, if anything, the fact that the Founders never raised constitutional concerns about *qui tam* and informer lawsuits demonstrates that they would be even less likely to harbor such concerns about modern-day citizen suits.

II. The Supreme Court's Recent Decision in *TransUnion LLC v. Ramirez* Provides Neither Justification for Adopting Stricter Standing Requirements for Citizen Suits Generally nor Any New Guidance for this Case Specifically.

Just as history provides no basis for questioning citizen suits as undermining the separation of powers, modern precedent does not either. Exxon's heavy reliance on the Supreme Court's recent decision in *TransUnion* is a red herring, as that case has nothing to do with the standing issue in this appeal specifically or the constitutionality of citizen suits generally. In fact, if *TransUnion* has anything of relevance to say here, it is that this Court should respect its "proper function in a limited and separated government," *TransUnion*, 141 S. Ct. at 2203 (quotation marks omitted), by refraining from devising judge-made rules for citizen suits simply because Exxon and its *amici* dislike them. *See, e.g.*, Appellants' En Banc Br. 10-12 (complaining that Plaintiffs seek to hold Exxon accountable for more violations than the state enforcement agency did); Industry En Banc *Amici* Br. 8 ("*Amici* and their members work hard to comply with a complex web of regulatory provisions under the Nation's environmental laws," and "[c]itizen suits should not supplant this ongoing regulatory process.").

A. Adopting More Stringent Standing Requirements for Citizen Suits Would Infringe on Article I, Undermining *TransUnion*'s Emphasis on Preserving the Separation of Powers Through Standing Doctrine.

To ensure the presence of a case or controversy, as Article III demands, the Supreme Court requires plaintiffs to prove three elements that constitute the "irreducible constitutional minimum of standing": (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent," (2) "a causal connection between the injury and the conduct complained of," and (3) the fact that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quotation marks omitted); *see, e.g.*, *Central & S. W. Servs., Inc. v. EPA*, 220 F.3d 683, 698 (5th Cir. 2000) (citing three prongs from *Lujan*). *TransUnion* dealt only with the first prong of that inquiry—whether a plaintiff has a judicially cognizable injury.

Specifically, in *TransUnion*, the Court analyzed standing to sue under the Fair Credit Reporting Act (FCRA), a statute that both creates a cause of action for private plaintiffs to sue *and* creates private rights. 141 S. Ct. at 2200-01. Plaintiffs, who had been flagged as potential terrorists, drug traffickers, and other serious criminals in their credit reports, sued TransUnion, and the Court held that only those individuals whose reports had been published to third parties had suffered a concrete injury, notwithstanding the fact that Congress had expressly conferred a right to accurate information in credit reports for all individuals. *Id.* at 2214. In so holding,

the Court explained that "the mere existence of inaccurate information in a database . . . traditionally has not provided the basis for a lawsuit in American courts," and thus the proof of inaccurate credit reports on its own was "insufficient to confer Article III standing." *Id.* at 2209 (quoting *Braitberg v. Charter Comms., Inc.*, 836 F.3d 925, 930 (8th Cir. 2016)). The chief lesson of *TransUnion* then is that an injury with a "'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts" is required to establish standing under Article III. *Id.* at 2204 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)).

As justification for its conclusion that certain plaintiffs did not suffer a concrete harm even though TransUnion had infringed those plaintiffs' statutory rights, the Court discussed the driving principle behind the standing requirement: preserving the Constitution's separation of powers. *Id.* at 2207. But that discussion was fundamentally about the fact that Congress may not "freely authorize *unharmed* plaintiffs"—meaning those plaintiffs who have not been harmed in a "traditional" way—"to sue defendants who violate federal law," as to do so "would infringe on the Executive Branch's Article II authority." *Id.* at 2207 (emphasis in original).

Critically, *TransUnion* imposed no limitations on Congress's ability to authorize *harmed* plaintiffs to sue by writing a private cause of action into statutes, much like it did in the Clean Air Act, *see* 42 U.S.C. § 7604(a), and many other laws

containing citizen-suit provisions. *See TransUnion*, 141 S. Ct. at 2205-06; *see also* Erwin Chemerinsky, *What's Standing After* TransUnion LLC v. Ramirez, 96 NYU L. Rev. Online 269, 275-77 (2021) (distinguishing from the FCRA those laws that authorize private suits but do not create any new rights). Indeed, the Court endorsed that approach, emphasizing that by "grant[ing] a plaintiff a cause of action to sue, . . . Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.'" *TransUnion*, 141 S. Ct. at 2204-05 (quoting *Spokeo*, 578 U.S. at 341)).

Thus, the Court's concern in *TransUnion* was not that statutes protecting the public welfare, like the Clean Air Act, might infringe on executive authority by authorizing enforcement by private plaintiffs in addition to the government. Rather, the Court's concern was that plaintiffs who suffered no "traditional" injury might point to some statutorily created right of which they were deprived and use that deprivation on its own as the basis for their injury.

Plaintiffs here do no such thing. In no way do their injuries depend upon the Clean Air Act's creation of some statutory right unmoored from history and tradition. Rather, their injuries—that is, "interference with recreation, breathing and smelling polluted air, and allergy-like or respiratory problems," *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.*, 47 F.4th 408, 416 (5th Cir. 2022); *see* Appellees' En Banc Br. 19-27 (describing Plaintiffs' members detailed testimony

regarding their injuries)—are precisely the "traditional" sort of injuries that the Court referenced in *TransUnion*. *See TransUnion*, 141 S. Ct. at 2200 (describing "physical harm" as "traditionally recognized as providing a basis for a lawsuit in American courts"); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000) ("We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." (citing *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) and *Lujan*, 504 U.S. at 562-63)). Tellingly, Exxon does not even attempt to contest this point.

Instead, Exxon attempts to transform what is really an argument about traceability into an argument about injury, asserting that "[i]f a person observed flaring or smelled odors, he or she suffered an injury-in-fact during that emission event," but "that does not prove he or she suffered the same injury during every emissions event." Appellants' En Banc Br. 38. This, Exxon says, is "the lesson of *TransUnion*." *Id.*

But the lesson of *TransUnion* is that flaring and smelling odors are indeed, as Exxon concedes, concrete, judicially cognizable injuries—the sorts of injuries that are likely to recur in the absence of Exxon's compliance with the Clean Air Act provisions invoked in this lawsuit. *TransUnion* has nothing to say about how to

ascertain whether Exxon is in fact responsible for causing all of Plaintiffs' ongoing injuries—the crux of the issue in this appeal. Nor could it, as there was no dispute in *TransUnion* that mistakes made by the credit reporting company were the source of the plaintiffs' injuries. *See Steel Co.*, 523 U.S. at 91 (explaining that aspects of jurisdictional rulings assumed without analysis—dubbed "drive-by jurisdictional rulings"—lack precedential value). That should end the matter.

B. *TransUnion* Does Not Require the Extraordinarily Detailed Parsing of the Connection Between Each Injury and Each Violation that Exxon Insists Upon.

Yet even if this Court were to entertain Exxon's assertion that *TransUnion* did more than simply opine on the types of injuries that are judicially cognizable, *TransUnion*'s discussion of the relationship between each plaintiff's injury, the defendants, and the remedy sought is simply inapplicable here. That is because *TransUnion* arose in a fundamentally different context than this case.

First, unlike the *TransUnion* plaintiffs who were members of a class certified under Rule 23, Plaintiffs in this case are two associations that claim standing to sue on behalf of their members. Although class actions and suits on behalf of associations serve somewhat related principles of judicial economy, in a class action, each individual class member is entitled to relief in his or her own right, whereas a plaintiff association obtains relief for the organization—the members are not parties to the lawsuit themselves, even though the relief obtained may ultimately vindicate

their rights. *See International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 288-89 (1986). In light of this distinction, though "[e]very class member must have Article III standing in order to recover individual damages" in a class action lawsuit, *TransUnion*, 141 S. Ct. at 2208, the Supreme Court has long held that only "*one* member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association" is required for associational standing. *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555 (1996) (emphasis added).

Exxon completely glosses over this distinction in repeatedly complaining to this Court that "[a]t trial, Plaintiffs presented testimony from just four of their members in an attempt to establish their standing to recover penalties for thousands of violations." Appellants' En Banc Br. 14. But that approach was wholly consistent with the Supreme Court's holding that "any *one* of [an association's members]" can establish standing for the organization. *Warth*, 422 U.S. at 511 (emphasis added). Exxon's frustration with Plaintiffs' approach does not render it legally unsound. This Court should thus ignore Exxon's attempt to frame Plaintiffs' manner of litigating this case as an outlier—the law permits Plaintiffs to establish standing for their harms through precisely the method that they utilized at trial, and it is Exxon's insistence on an exceptionally detailed standing showing that is unprecedented.

Second, unlike the FCRA provision at issue in *TransUnion*, which authorizes "actual damages" paid to plaintiffs for past violations of the Act, 15 U.S.C. § 1681n(a)(1)(A), the Clean Air Act authorizes civil penalties paid to the federal government that deter the defendant from engaging in ongoing and future pollution, 42 U.S.C. § 7604(a), (g). The principle that civil penalties in citizen suits seek to halt current misbehavior and deter future violations rather than remedy past violations is firmly established. In *Steel Co. v. Citizens for a Better Environment*, the Supreme Court held that citizen suitors may not seek penalties payable to the federal treasury for wholly past violations. *See* 523 U.S. at 106-07 (holding that civil penalties do not redress private plaintiffs' past injuries). But just two years later, in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, the Court clarified that private plaintiffs may seek civil penalties to remedy ongoing and future injuries because such sanctions "encourage defendants to discontinue current violations and deter them from committing future ones." 528 U.S. at 186. These cases establish that the standing inquiry in cases like this one must be forward-looking.

Exxon concedes, as it must, that the Supreme Court has held that civil penalties are prospective in nature, *see* Appellants' En Banc Br. 56, but then puzzlingly asserts that Plaintiffs—whose members live in close proximity to the Baytown complex and have experienced essentially continuous injuries from

Exxon's essentially continuous violations of the Clean Air Act—are required to submit proof linking each *past* violation to each date and emission event and particular symptom their members experienced. In other words, Exxon admits that Plaintiffs seek a prospective remedy but still argues that the standing analysis here must be retrospective. *See id.* ("Because penalties are assessed for past violations, causation cannot be a forward-looking inquiry.").

This makes little sense. In *TransUnion*, because the plaintiffs were entitled to "actual damages" for past injuries, the Court needed to link those damages precisely to the plaintiffs' past injuries to compensate them for prior harms. But here, Plaintiffs do not seek compensation for prior injuries; rather, the harms redressed by civil penalties are ongoing and future harms. Thus, the standing analysis must be forward-looking, focusing on the ways in which Exxon contributes to the types of injuries Plaintiffs are suffering and will continue to suffer in the absence of relief. Plaintiffs do not need to "connect the exact time of their injuries with the exact time of an alleged violation," *Texans United*, 207 F.3d at 793, nor do they need to prove that Exxon was the but-for cause of each of their individual harms. Indeed, neither this Court nor the Supreme Court has ever required the level of detail that Exxon insists is necessary here—in a citizen suit, or otherwise.

* * *

In sum, citizen suits are part of a long tradition of legislative authorization of private enforcement of statutes intended to protect the public welfare. These laws were never questioned on separation-of-powers grounds at the Founding, and *TransUnion* supplies no reason for this Court to question them now, centuries later. As the Supreme Court there made clear, "[c]ourts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation." *TransUnion*, 141 S. Ct. at 2204. In other words, judges do not have the authority to second-guess Congress's creation of private causes of action to sue. That is true even when Congress, as in the Clean Air Act, confers a private cause of action in an area of law that is also heavily regulated by federal and state agencies. If Exxon does not like private citizens getting involved, it should voice its complaints to Congress rather than asking this Court to artificially constrain citizen suits in defiance of Congress's prerogatives.

CONCLUSION

For the foregoing reasons, this Court should hold that Plaintiffs have standing.

Respectfully submitted,

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Dated: April 26, 2023

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on April 26, 2023.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 26th day of April, 2023.

/s/ Brianne J. Gorod
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,130 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Executed this 26th day of April, 2023.

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