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CASE NOTE

Noah T. Allaire*

UP IN THE AIR: ENVIRONMENT TEXAS AND THE NEW VIOLATION-BASED APPROACH TO DETERMINING STANDING IN ENVIRONMENTAL CITIZEN SUITS

INTRODUCTION

As public concern about pollution and changing environmental conditions increases, citizen groups are emboldened to bring larger lawsuits against the corporations they consider responsible for environmental harm. *Environment Texas Citizen Lobby, Inc. v. ExxonMobil Corp.* represents the federal judiciary's uncertainty about how to fairly handle environmental citizen suits at this new scale.[1] Across three *Environment Texas* appeals ("*ETCL I–III*"), the United States Court of Appeals for the Fifth Circuit has struggled to reconcile environmental groups' statutory right to sue to enforce the Clean Air Act (CAA) with the constitutional requirement that plaintiffs must prove injury-in-fact, causation, and redressability to have standing to sue in federal court.

Environment Texas Citizen Lobby (Environment Texas) and the Sierra Club (collectively "plaintiffs") sued Exxon under 42 U.S.C. § 7604(a)(1)—a citizen suit provision of the CAA—alleging almost 4,000 unauthorized emissions events occurring from October 2005 to September 2013 at Exxon's Baytown, Texas complex.[2] The plaintiffs asked the District Court for the Southern District of Texas

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1. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408 (5th Cir. 2022), *vacated*, *reh'g granted en banc*, No. 17-20545, 2023 U.S. App. LEXIS 4698 (5th Cir. Feb. 17, 2023).

2. *Id.* at 413–14. *See also* Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 363, 378 n.1 (5th Cir. 2020), *vacated*, *reh'g granted en banc*, No. 17-20545, 2023 U.S. App. LEXIS 4698 (5th Cir. Feb. 17, 2023) (noting that Exxon did not challenge the plaintiffs' calculation method under which "241 reported events and 3,735 recorded events . . . resulted in 16,386 days of violations").

to fine the petrochemical giant over $600 million dollars.[3] The district court found only a few of the alleged violations actionable,[4] and denied all requested relief.[5]

The environmental citizen group plaintiffs appealed and in *ETCL I* the Fifth Circuit vacated and remanded the case for new fact-finding with respect to actionability and three factors—the duration of the violations, the seriousness of the violations, and the economic benefit of noncompliance—courts must use in assessing civil penalties under the CAA.[6] On remand, the district court found all of the 16,386 violations actionable but imposed a civil penalty of only $19.95 million dollars.[7] Exxon appealed and in *ETCL II* the Fifth Circuit announced a new violation-based approach to determining citizen groups' standing to sue under the CAA and vacated and remanded the case once again for revised findings of fact and conclusions of law.[8] On the second remand, the district court found only 3,651 of the 16,386 violations actionable and reduced the penalty to $14.25 million dollars.[9] Exxon appealed again and in *ETCL III*, the Fifth Circuit declined to reconsider its previous approach to standing[10] and deferred to the district court's discretion in the assessment of penalties.[11] Finally, on February 17, 2023, the Fifth Circuit vacated *ETCL II* and *III* and granted rehearing en banc.[12]

Considering the dramatic twists and turns *Environment Texas* has already taken, it is difficult to predict what will happen next. The en banc Fifth Circuit could reject the new violation-based approach to determining standing announced in *ETCL II* and affirmed in *ETCL III* by accepting the plaintiffs' argument that CAA citizen suit plaintiffs are only required to prove standing for each claim, rather than each violation.[13] On the other hand, the Fifth Circuit is more likely to make the new

3. Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 365 (5th Cir. 2020) *vacated*, *reh'g granted en banc*, No. 17-20545, 2023 U.S. App. LEXIS 4698 (5th Cir. Feb. 17, 2023).

4. *Id.* at 363 (explaining that the district court's analysis of actionability relied on the CAA's limitation of citizen suits "to violations that were repeated in the past or ongoing at the time of the complaint") (citing Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 66 F. Supp. 3d 875, 895-902 (S.D. Tex. 2014)). *See also* 42 U.S.C. § 7604(a)(1) (allowing a citizen suit if the defendant caused repeated violations or is in violation of an emissions standard or limit).

5. *Env't Tex.*, 968 F.3d at 363–364.

6. *Id.* at 364.

7. *Id.*

8. *Id.*

9. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 414 (5th Cir. 2022) (explaining that the district court "lessen[ed] the penalty by more than five million dollars to reflect the reduced number of justiciable violations."). *See also* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 524 F. Supp. 3d 547, 565, 577 (S.D. Tex. 2021).

10. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 415 (5th Cir. 2022) ("Exxon takes two shots at our standing framework. First, it says that a recent decision from the Supreme Court abrogates our finding of injury-in-fact. Second, it argues that our traceability precedent is overly broad and risks exceeding the bounds of Article III. Neither reason compels us to redo our prior opinion. Nor could we; our prior opinion is law of the case.").

11. *Id.* at 420.

12. Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., No. 17-20545, 2023 U.S. App. LEXIS 4698 (5th Cir. Feb. 17, 2023).

13. Env't Tex. Citizen Lobby v. Exxonmobil Corp., 968 F.3d 357, 365 (explaining that the plaintiffs' argument for a claims-based approach to determining standing is refuted by the fact that "Clean Air Act penalties are tied to violations, not the broader claims").

violation-based standing test even more stringent by adopting Exxon's view that "Article III requires plaintiffs to show that each challenged emission is a but-for cause of their injuries"[14] and accepting Exxon's argument that *ETCL II* "impermissibly restricted the district court's factfinding ability"[15] in holding that "the then-existing findings . . . established traceability for some categories of violations."[16] Either (or any) result will likely change the final penalty determination and have interesting consequences for future environmental citizen suits in and beyond the Fifth Circuit.

This note analyzes *Environment Texas* with specific attention given to its relevance for plaintiffs and defendants in future environmental citizen suits. Section I describes relevant provisions of the CAA, Article III standing requirements, and expands on the lengthy procedural history of the case. Section II analyzes the three key arguments raised by Exxon in *ETCL III* and the Fifth Circuit's responses to them.

I. BACKGROUND

A. The Clean Air Act, Citizen Suits, and Article III Standing Requirements

The CAA "establishes a comprehensive program for controlling and improving the nation's air quality through both state and federal regulation."[17] Congress enacted the CAA in response to growing public concern about air pollution caused by "urbanization, industrial development, and the use of motor vehicles. . . ."[18] The CAA represents Congress's attempt to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population. . . ."[19]

Under the CAA, the United States Environmental Protection Agency (EPA) is authorized to identify dangerous air pollutants and formulate National Ambient Air Quality Standards (NAAQS) designed to limit the concentration of dangerous pollutants in the air.[20] To this end, the CAA allows the EPA to regulate all major sources of air pollution using a comprehensive permitting system.[21] The CAA defines "major stationary source" and "major emitting facility" as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any pollutant. . . ."[22] Further, the CAA defines "emission limitation" and "emission standard" as "a requirement established by the State or the [EPA] Administrator which limits the quantity, rate, or concentration of

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14. *Env't Tex.*, 47 F.4th at 417 (rejecting Exxon's "unconvincing" but-for causation standard argument).

15. *Id.* at 418 (rejecting Exxon's "conceptual" challenge to the district court's justiciability determination).

16. *Id.* (citing Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d at 371) (internal quotation omitted).

17. Sierra Club v. EPA, 774 F.3d 383, 386 (7th Cir. 2014).

18. 42 U.S.C. § 7401(a)(2).

19. 42 U.S.C. § 7401(b)(1).

20. *See Sierra Club*, 774 F.3d at 386.

21. *See* KATE C. SHOUSE & RICHARD K. LATTANZIO, CONG. RSCH. SERV., CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 1 (2020).

22. 42 U.S.C. § 7602(j).

emissions of air pollutants on a continuous basis. . . ."[23] In accordance with the CAA's dual-federalism model, states generally bear the primary responsibility for enforcing the permitting system and ensuring NAAQS are met within their borders.[24]

In an exception to the states' primary enforcement authority, the CAA provides "any person" the right to bring a civil action against any other person "who is alleged to have violated . . . or to be in violation of [] an emission standard or limitation under [the Act.]"[25] Any person can also sue the EPA Administrator for failure to enforce the Act.[26] Lawsuits brought under these provisions are called citizen suits. The United States Supreme Court has found that the CAA citizen suit provisions reflect "a deliberate choice by Congress to widen citizen access to the courts, as a supplemental and effective assurance that the [Clean Air] Act would be implemented and enforced."[27]

The CAA requires citizen suit plaintiffs to assert repeated violations of an emissions standard to bring a claim[28] and provides that a "penalty *may* be assessed for each day of violation."[29] Thus, the CAA allows, but does not require, courts to assess civil penalties for actionable permit violations and places no upper limit on the number of violations plaintiffs can allege within a single claim.[30] In deciding whether to assess a penalty and the penalty amount, courts must consider seven factors: (1) the size of the violator's business, (2) the economic impact of the penalty on the business, (3) the violator's full compliance history and good faith efforts to comply, (4) the duration of the violation, (5) payment by the violator of penalties previously assessed for the same violation, (6) the economic benefit of noncompliance, and (7) the seriousness of the violation.[31] Any penalties resulting from CAA citizen suits are either deposited in a special United States Treasury fund or authorized to be used in air pollution mitigation projects.[32] Thus, plaintiffs bringing citizen suits under the CAA cannot recover actual damages for their alleged injuries.[33]

Citizen suit provisions are common in federal environmental statutes.[34] Indeed, the broad availability of citizen suits under federal environmental law has

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23. 42 U.S.C. § 7602(k).

24. Sierra Club v. EPA, 774 F.3d 383, 386 (7th Cir. 2014).

25. 42 U.S.C. § 7604(a).

26. *Id*.

27. Friends of the Earth v. Carey, 535 F.2d 165, 172 (2d Cir. 1976) (citing Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 700 (D.C. App. 1975)).

28. 42 U.S.C. § 7604(a)(1).

29. 42 U.S.C. § 7413(e)(2) (italics added).

30. *Id*.

31. 42 U.S.C. § 7413(e)(1).

32. 42 U.S.C. § 7604(g).

33. Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Co., 367 F. Supp. 1040, 1047 (D. Del. 1973) (explaining that "the citizen's suit section of the Clean Air Act was not intended to authorize the payment of damages to an environmental group for injuries to its members").

34. *See, e.g.*, 16 U.S.C. § 1540(g) (any person may sue for violations of the Endangered Species Act); 33 U.S.C. § 1365 (any citizen may sue for violations of the Clean Water Act); 42 U.S.C. § 6972 (any person may sue for violations of the Resource Conservation and Recovery Act).

"conserved innumerable agency resources and saved taxpayers billions."[35] Still, like all plaintiffs in federal courts, environmental citizen suit plaintiffs must satisfy Article III standing requirements to show that the court has subject-matter jurisdiction over their claims.[36]

Article III of the United States Constitution authorizes federal courts to hear only certain types of "Cases" and "Controversies" including those arising under "the Laws of the United States."[37] These words are interpreted as imposing limits on the subject-matter jurisdiction of the federal judiciary.[38] Chief among those limits is the "irreducible constitutional minimum of standing. . . ."[39] In *Warth v. Seldin*, the Supreme Court explained that "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute. . . ."[40]

Injury-in-fact, causation, and redressability are the three elements of standing.[41] To prove injury-in-fact, the plaintiff must allege a "concrete and particularized" injury that is "actual or imminent. . . ."[42] To prove causation, the plaintiff's injury must be "fairly traceable" to the defendant's conduct.[43] To prove redressability, it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[44] Further, a citizen group may have standing to sue on behalf of its members when "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[45] Finally, state administrative action against a defendant does not preclude a citizen group's standing to sue for violations of federal environmental law.[46]

The Supreme Court has traditionally taken a narrow view of standing and the federal judiciary in general may be returning to that tradition. Recently in *TransUnion v. Ramirez*, the Supreme Court emphatically held that "standing is not dispensed in gross."[47] Although the Court has not addressed standing in the context

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35. James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 10 Widener L. Rev. 1, 4 (2003).

36. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

37. U.S. Const. art. III, § 2.

38. *See* Env't Tex. Citizen Lobby v. Exxonmobil Corp., 968 F.3d 357, 364 (explaining that "The Constitution limits congressional grants of federal court jurisdiction") (citing Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809) for the instruction to "[t]urn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution").

39. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 414–15 (5th Cir. 2022) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)) (internal quotation omitted).

40. 422 U.S. 490, 498 (1975).

41. *See Defenders of Wildlife*, 504 U.S. at 560–61.

42. *Id.*

43. *Id.*

44. *Id.* at 561.

45. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000) (citing Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977)). *See also* Texans United for a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000).

46. Texans United for a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 795 (5th Cir. 2000).

47. TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2208 (2021).

of a CAA citizen suit, its decisions in citizen suits brought under the Clean Water Act and the Endangered Species Act indicate that environmental citizen suit plaintiffs face distinct challenges in satisfying Article III standing requirements.[48] In CAA citizen suits brought against corporations operating petroleum or chemical refineries, lower courts have relied on case-specific facts to determine standing with mixed results for plaintiffs.[49]

B. Procedural History of Environment Texas

In Baytown, Texas, a suburb of Houston, Exxon owns and operates "the largest petroleum and petrochemical complex in the nation. . . ."[50] The Texas Commission on Environmental Quality and the EPA are jointly responsible for enforcing federal permits that regulate Exxon's emissions at the Baytown complex.[51] The permits require Exxon to document and self-report certain incidents of noncompliance with emissions standards and limits for various pollutants.[52]

Environment Texas and the Sierra Club sued Exxon on behalf of their members who live, work, and recreate in Baytown under 42 U.S.C. § 7604(a)(1)—the applicable citizen suit provision of the CAA.[53] The plaintiffs sought over $640 million dollars in penalties in a bold attempt to hold Exxon liable for over 16,386 self-reported days of violations.[54] Specifically, the plaintiffs alleged their members "regularly saw flares, smoke, and haze coming from the complex; smelled chemical odors; suffered from allergy-like or respiratory problems; feared for their health;

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48. *See Laidlaw*, 528 U.S. at 175 (2000) (holding that Clean Water Act citizen suit plaintiffs lack statutory standing "to sue for violations that have ceased by the time the complaint is filed."); *Defenders of Wildlife*, 504 U.S. 555, 566 (rejecting an Endangered Species Act citizen suit plaintiff's "animal nexus" approach to standing under which "anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing").

49. *See* Berry v. Farmland Indus., Inc., 114 F. Supp. 2d 1150 (D. Kan. 2000) (plaintiff neighbors of defendant refinery lacked standing where the defendant filed corrective reports before the suit was filed because plaintiffs failed to show that the risk of future reporting violations was imminent); St. Bernard Citizens for Envtl. Quality, Inc. v. Chalmette Ref. L.L.C., 354 F. Supp. 2d 697 (E.D. La. 2005) (plaintiff environmental organizations proved traceability and therefore had standing where defendant refinery admitted that it was causing chemical odors); Concerned Citizens Around Murphy v. Murphy Oil USA, Inc., 686 F. Supp. 2d 663 (E.D. La. 2010) (plaintiff organization satisfied standing requirements because (1) plaintiff's members used and enjoyed their yards and neighborhood less because of odors emanating from defendant's refinery, and (2) odors grew stronger when plaintiff's members got closer to defendant's refinery.).

50. Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 362 (5th Cir. 2020). *See also* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 413 (5th Cir. 2022) (noting that the complex "houses a refinery, a chemical plant, and an olefins plant").

51. *Env't Tex.*, 968 F.3d at 363 ("The Texas Commission on Environmental Quality issues the permits under Title V of the Clean Air Act. The Commission, along with the EPA, enforces the permits.").

52. *Id.* ("To monitor compliance, the Commission requires polluters to document unauthorized "emissions events"—that is, unplanned or unscheduled emissions. If the event produces pollutants in excess of thresholds, the polluter must report it to the Commission.").

53. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 413 (5th Cir. 2022).

54. *Env't Tex.*, 968 F.3d at 365, 363, 378 n.1 (5th Cir. 2020) (explaining that because CAA penalties may be assessed for each day of violation and each day of violation incurs a penalty of either $32,500 or $37,500, "the statutory cap exceeded $600 million" and noting that Exxon did not challenge the plaintiffs' calculation method under which "241 reported events and 3,735 recorded events . . . resulted in 16,386 days of violations").

refrained from outdoor activities; or moved away."[55] The plaintiffs grouped the 16,386 violations into five counts or "buckets".[56] After a thirteen-day bench trial, the District Court for the Southern District of Texas took what could be called the nothing approach to determining standing—it found "only a few" of the violations actionable and declined to assess any penalty against Exxon.[57]

The plaintiffs appealed and in *ETCL I*, the Fifth Circuit held that "the district court erred in its analysis of Exxon's substantive liability and abused its discretion in addressing three of the factors that courts consider in assessing civil penalties."[58] Specifically, the *ETCL I* court found the district court should have assessed a penalty against Exxon in light of the duration of the violations, the seriousness of the violations, and the economic benefit flowing to Exxon as a result of its noncompliance.[59] On remand in 2017, the district court took what could be called the all approach to determining standing—it found Exxon liable for all of the 16,386 permit violations but assessed a penalty of only $19.95 million dollars,[60] which is far short of the $640 million dollar penalty sought by the plaintiffs.

Unsatisfied with this result, Exxon appealed and "asserted that the plaintiffs only proved standing for a handful of violations. . . ."[61] The company also contested the district court's revised penalty determination.[62] The *ETCL II* court agreed with Exxon, rejecting the plaintiffs' argument that CAA citizen suit plaintiffs only need to prove standing for each of their five claims.[63] In a dramatic break from precedent, *ETCL II* announced a new violation-based approach to determining standing in citizen suits brought under the CAA based almost solely on the plain text of the Act.[64]

The *ETCL II* court explained that a claims-based approach to determining standing "runs up against the principle that one injury does not entitle a litigant to right other wrongs that did not injure it."[65] Significantly, the court relied on *Blum v. Yaretsky* in questioning whether the plaintiffs' members' alleged injuries, even if traceable to Exxon's violations, afforded them "the necessary stake in litigating

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55. *Id.* at 368.

56. *Id.* at 363. *See also* Andrew Barron, *Standing after Environment Texas: The Problem of Cumulative Environmental Harm*, 48 ECOLOGY L.Q. 711, 713 (2021) (describing the five categories of violations as "upset emissions, hourly limits, weight limits, visible flares, and pilot flame requirements").

57. *See* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 66 F. Supp. 3d 875, 895-904, 911-12 (S.D. Tex. 2014). *See also* Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 363-64 (5th Cir. 2020) (noting the district court's ruling that "even if every alleged violation were actionable, it would decline to assess a civil penalty against Exxon").

58. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 414.

59. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 824 F.3d 507, 524–33.

60. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 2017 U.S. Dist. LEXIS 72213, at *25–31 (S.D. Tex. Apr. 26, 2017).

61. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 414 (5th Cir. 2022).

62. *Id.*

63. *See Env't Tex.*, 968 F.3d at 365 (explaining that the plaintiffs' argument for a claims-based approach to determining standing is refuted by the fact that "Clean Air Act penalties are tied to violations, not the broader claims").

64. *Id.* at 365–67. *See also* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 415 ("Clean Air Act plaintiffs must prove [the elements of standing] for each claimed violation.").

65. Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 365 (5th Cir. 2020).

conduct of another kind, although similar, to which [they have] not been subject."[66] Thus, the court extended a principle that "typically arises in suits against the government, preventing plaintiffs with standing to challenge one facet of a regulatory scheme from challenging the whole regulatory scheme" to environmental citizen suits against heavily regulated corporations brought under the CAA.[67]

Addressing its break from precedent, the *ETCL II* court observed that "no court appears to have found standing for some Clear Air Act violation but not others" and acknowledged "[n]umerous cases have instead recognized standing in environmental citizen suits without separate analyses for each violation."[68] For example, in *Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corp.*,[69] the Fifth Circuit did not apply a violation-based standing test in determining whether the citizen group plaintiff had standing to sue under the CAA for 625 emissions standards violations at an oil refinery.[70] Similarly, in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*,[71] the Supreme Court did not apply a violation-based standing test in holding that a Clean Water Act citizen suit plaintiff had standing to sue an emitter for 489 violation of mercury discharge limits.[72]

The *ETCL II* court attempted to distinguish from these previous cases based on the number and variety of violations and pollutants at issue and by explaining that "the standing inquiry is not one-size-fits-all."[73] Thus, the court concluded that the "great variety of the challenged emissions—both in terms of type and scale" necessitated the creation of a new violation-based standing test.[74] More concretely, the *ETCL II* court held that its new violation-based standing test was supported by the plain text of the act, which ties penalties to the number of actionable violations.[75]

Although the Fifth Circuit's new violation-based standing test has been called a "violation-by-violation approach[,]"[76] the *ETCL II* court's instructions to the district court and its subsequent decision in *ETCL III* show that the new test is more accurately described as an each-type of violation approach to determining standing. A close reading of *ETCL II*'s standing framework proves this point. First, *ETCL II* instructed the district court to determine whether the plaintiffs had established traceability for each of Exxon's 16,386 permit violations.[77] Counterintuitively, *ETCL II* also held that the district court did not have to make "line-by-line findings for the thousands of violations."[78] Instead, *ETCL II* instructed the district court to group the

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66. *Env't Tex.*, 968 F.3d at 365 (quoting Blum v. Yaretsky, 457 U.S. 991, 999 (1982)) (internal quotation marks omitted).

67. *Id.*

68. *Id.* at 366.

69. Texans United for a Safe Economy Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 792 (5th Cir. 2000)

70. *Id.* at 791 n.4.

71. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167 (2000).

72. *Id.* at 176, 180–88.

73. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 414 (5th Cir. 2022).

74. *Id.* at 367.

75. *Id.* at 365.

76. *See e.g.*, Barron, *supra* note 56, at 711.

77. Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 371 (5th Cir. 2020).

78. *Id.*

violations by type and magnitude and then determine whether the plaintiffs had proved standing for each type of violation.[79]

ETCL II's new violation-based standing test "had a significant impact on remand."[80] The district court determined the plaintiffs had established traceability for only 3,651 of the 16,386 violations and reduced the penalty against Exxon to $14.25 million dollars.[81] In other terms, the new each-type-of-violation approach reduced the number of actionable violations by over 75% but the district court reduced its penalty assessment by only 29%.

Still unsatisfied, Exxon appealed again. In August 2022, the Fifth Circuit issued its third opinion in the case—*ETCL III*.[82] *ETCL III* presented the Fifth Circuit with an opportunity to return to the claims-based approach to determining standing, adopt a true violation-by-violation approach, or simply affirm *ETCL II*'s each-type-of-violation approach. The *ETCL III* court chose the third option, dismissing Exxon's arguments and affirming the district court's "fact-intensive analysis of standing [and] penalty."[83] A discussion of *ETCL III* and its implications for future environmental citizen suits is presented below.

II. ANALYSIS

Exxon raised three arguments in *ETCL III*. First, the company argued that the Supreme Court's decision in *TransUnion LLC v. Ramirez*[84] was an intervening change in case law requiring the Fifth Circuit to reconsider its previous injury-in-fact conclusions in *ETCL II*.[85] Second, Exxon urged the court to adopt a but-for causation standard for determining whether the plaintiffs' members' injuries were fairly traceable to Exxon's permit violations and challenged the *ETCL II*'s instructions to the district court and the district court's application of the new violation-base standing test with respect to traceability.[86] Third, the company argued the district court should have reduced the penalty amount in proportion to the number of actionable violations.[87] This section addresses each of these three arguments in turn and discusses implications for future environmental citizen suits.

A. Injury-in-Fact After TransUnion

In *ETCL II*, the Fifth Circuit held that the environmental group plaintiffs "easily" met their burden of proving injury-in-fact because "throughout the claims period, [members of the environmental groups] regularly saw flares, smoke, and haze coming from the [Baytown] complex; smelled chemical odors; suffered from allergy-like or respiratory problems; feared for their health; refrained from outdoor

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79. *Id. See also* Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th at 419.
80. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th at 414.
81. *Id*.
82. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408 (5th Cir. 2022).
83. *Id*. at 413.
84. TransUnion, LLC v. Ramirez, 141 S. Ct. 2190 (2021).
85. *Env't Tex. Citizen Lobby*, 47 F.4th at 415.
86. *Id*. at 417.
87. *See id*. at 421.

activities; or moved away."[88] In *ETCL III*, Exxon argued that the Supreme Court's decision in *TransUnion LLC v. Ramirez* abrogated *ETCL II*'s injury-in-fact conclusions.[89] *ETCL III* rejected Exxon's intervening case law argument, explaining that "[u]ntil the highest court unequivocally overrules our precedent, we are bound by it."[90]

TransUnion was a class-action suit brought under the Free Credit Reporting Act by consumers who alleged a credit reporting agency had failed to ensure the accuracy of their credit files.[91] The class included consumers whose inaccurate credit reports had actually been sent to potential creditors and consumers whose inaccurate credit reports had not been sent to potential creditors.[92] In a 5-4 majority opinion by Justice Kavanaugh, the Supreme Court held that the group of consumers whose inaccurate credit reports had not been sent to creditors failed to establish injury-in-fact and therefore lacked standing.[93] The Court weighed the consumers' statutory cause of action against Article III standing requirements and emphasized that a statutory cause of action does not automatically confer standing when the plaintiff has not suffered the type of concrete harm that is "traditionally recognized as providing a basis for a lawsuit in American courts. . . ."[94]

In *ETCL III*, the Fifth Circuit acknowledged that "Supreme Court rulings can overrule our precedent"[95] before concluding that *TransUnion* actually supports *ETCL II* 's conclusion that Environment Texas and the Sierra Club easily met their burden of proving injury-in-fact.[96] *ETCL III* relied in large part on a hypothetical offered by the Justice Kavanaugh in *TransUnion* to support its analysis of the effect of *TransUnion* on *ETCL II*.[97] The *TransUnion* hypothetical involves a citizen of Maine and a citizen of Hawaii suing a factory in Maine for violations of federal environmental law.[98] Writing for the Court, Justice Kavanaugh explained the citizen of Maine would likely have standing because they could make a case for concrete harm to property while the citizen of Hawaii would lack standing because their interest in the hypothetical case would be largely conceptual.[99]

Analogizing to Justice Kavanaugh's *TransUnion* hypothetical, the *ETCL III* court reasoned that Environment Texas and the Sierra Club were more like the Maine citizen than the Hawaii citizen because the evidence they presented at trial showed their members "personally experience the effects of Exxon's unauthorized emissions."[100] Still, the *ETCL III* court alluded to its uncertainty and the risk of being

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88. Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 367-68 (5th Cir. 2020).
89. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 416 (5th Cir. 2022).
90. *Id.* at 415 (quoting United States v. Zuniga-Salina, 945 F.2d 1302, 1306 (5th Cir. 1991)) (internal quotation omitted).
91. *See generally* TransUnion, LLC v. Ramirez, 141 S. Ct. 2190 (2021).
92. *Id.*
93. *Id.*
94. *Id.* at 2209.
95. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 415 (5th Cir. 2022).
96. *Id.* at 416.
97. *Id*.
98. *Id*.
99. *See* TransUnion, LLC v. Ramirez, 141 S. Ct. 2190, 2205-06 (2021).
100. *Env't Tex. Citizen Lobby*, 47 F.4th at 416.

overruled, noting that "we cannot disregard our precedent simply because we think the [Supreme] Court might someday disagree with it."[101] The court concluded that *ETCL II*'s injury-in-fact conclusions could not be disturbed on appeal because there was no new substantially different evidence, controlling authority had not changed, and maintaining the previous injury-in-fact conclusions would not result in manifest injustice.[102] The *ETCL III* dissent argued the plaintiffs' failed to produce trial testimony that was detailed enough to establish concrete harm.[103]

The *ETCL III* court's expression of doubt about the risk of being overruled by the Supreme Court is significant. The en banc Fifth Circuit could disagree with *ETCL III*'s analysis of *TransUnion*. Despite its obvious factual similarities to the facts of *Environment Texas*, Justice Kavanaugh's *TransUnion* hypothetical indicates that the Supreme Court would reject a conclusory approach to determining injury-in-fact in the context of an environmental citizen suit against a heavily regulated corporation if the plaintiff's injuries were largely conceptual. Further, in his hypothetical, Justice Kavanaugh singled out the Maine citizen's potential to show concrete harm to property as the relevant difference distinguishing her from the Hawaii citizen for the purpose of establishing standing.[104] More generally, *TransUnion* represents a stringent approach to the standing inquiry—it prohibits federal courts from dispensing standing in gross. The *ETCL III* court arguably dispensed standing in gross when it failed to require the district court to analyze whether the plaintiffs proved injury-in-fact for each violation or each type of violation.

Both *Environment Texas* and *TransUnion* are indications of a trend in the federal judiciary towards a narrow view of standing. Despite *ETCL III*'s conclusory approach to injury-in-fact, the new violation-based approach to determining standing entails a violation-based approach to each of the three elements of standing, not just causation. If environmental groups continue to bring citizen suits at the scale of *Environment Texas*, then federal courts beyond the Fifth Circuit may respond by adopting a violation-based approach to determining standing in and beyond the CAA citizen suit context. Such an approach will take one of two forms—the each-type-of-violation approach announced in *ETCL II* in the context of a dispute about causation or an even more stringent violation-by-violation approach. Either form of a violation-based approach to determining injury-in-fact could call into question key environmental precedent establishing that aesthetic or recreational injuries are sufficient to show concrete harm.[105]

To avoid these possible outcomes, plaintiffs in future environmental citizen suits should be prepared to provide highly detailed evidence unequivocally establishing concrete and particularized harm for each violation, or at least each type of violation, they allege. Further, environmental citizen suit plaintiffs may emphasize

101. *Id*. at 415.

102. *Id*.

103. *Id*. at 423 (Oldham, J., dissenting).

104. *TransUnion*, 141 S. Ct. at 2206 (explaining that the Maine citizen's hypothetical lawsuit "may of course proceed in federal court because the plaintiff has suffered concrete harm to her property").

105. *See e.g.*, Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 183 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 562–63 (1992); Sierra Club v. Morton, 405 U.S. 727, 735 (1972).

harm to property over aesthetic or recreational injuries because harm to property is indisputably a type of injury traditionally recognized as providing a basis for suit in American courts. Future environmental citizen suit defendants might successfully argue that aesthetic and recreational injuries are largely conceptual, rather than sufficiently concrete and particularized to establish injury-in-fact.

B. Causation After ETCL II

ETCL II announced the Fifth Circuit's new violation-based approach to determining standing in the context of a dispute over whether the environmental group plaintiffs proved their members' injuries were fairly traceable to Exxon's violations.[106] *ETCL II* concluded that the district court failed to distinguish between violations that were fairly traceable to Exxon's violations and those that were not.[107] Still, cautioning against a true violation-by-violation approach to determining causation that would be too stringent and time-consuming, the *ETCL II* court held that CAA citizen suit plaintiffs "need not connect the exact time of their injuries with the exact time of an alleged violation."[108] The court explained that proving causation merely requires plaintiffs to show that each alleged violation "causes or contributes to the kinds of injuries they allege"[109] and has a "specific geographic or other causative nexus such that the violation could have affected their members."[110]

Responding to *ETCL II*, one commentator observed that "[d]istrict courts may emphasize the "*contributes to*" language to consider evidence of cumulative harm going forward."[111] Indeed, that language provides courts with a possible workaround to avoid the stringent effects of a violation-based approach to determining causation. On the other hand, there is compelling argument against the causes or contributes to standard because it does not strictly entail but-for causation. Still, the causes or contributes standard is supported by "more than three decades of case law from [the Fifth Circuit] holding that traceability requires less of a causal connection than tort law."[112]

In *ETCL III*, Exxon attacked the flexibility of the causes or contributes standard and urged the Fifth Circuit to apply a but-for causation standard instead.[113] The *ETCL III* court acknowledged that "a but-for causal connection is *sufficient* to establish traceability" before concluding that "the Supreme Court has never said such proof is *required*."[114] The *ETCL III* court noted that in *Friends of the Earth, Inc., v. Laidlaw*,[115] the Supreme Court did not "require the plaintiffs to connect their injuries

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106. *See* Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357 (5th Cir. 2020).

107. *Id*. at 369.

108. *Id*. at 368 (quoting Texans United for a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp., 207 F.3d 789, 792-93 (5th Cir. 2000)).

109. *Id*. at 369–70 (quoting Sierra Club, Lone Star Chapter v. Cedar Point Oil Co. Inc., 73 F.3d 546, 557 (5th Cir. 1996)).

110. *Id*.

111. Barron, *supra* note 56, at 716–17.

112. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 417 (5th Cir. 2022).

113. *Id.* (rejecting Exxon's argument that "Article III requires plaintiffs to show that each challenged emission is a but-for cause of their injuries").

114. *Id*.

115. Friends of the Earth, Inc., v. Laidlaw, 528 U.S. 167.

to specific unlawful discharges. Instead, it credited testimony that the plaintiffs' members no longer recreated near or waded in a river because of their concerns about pollutants."[116] Still, the court acknowledged that *Laidlaw* was not directly on point because "the [*Laidlaw*] Court did not conduct a separate standing inquiry for each violation."[117]

In *ETCL III*, Exxon also challenged the district court's application of the standing framework announced in *ETCL II*.[118] *ETCL II* instructed the district court to find that the plaintiffs had established traceability for broad categories of violation-types including "any violation that could cause or contribute to flaring, smoke, or haze."[119] For any violations that could not cause or contribute to flaring, smoke or haze, *ETCL II* instructed the district court to (1) determine whether the emitted pollutant "could cause or contribute to chemical odors or allergy-like or respiratory symptoms,"[120] (2) conduct a geographic nexus inquiry, and (3) conduct a series of inquiries to determine whether the emission was "of sufficient magnitude to reach Baytown neighborhoods outside the Exxon complex in quantities sufficient to cause chemical odors, allergy-like symptoms, or respiratory symptoms."[121]

In *ETCL III*, Exxon argued that *ETCL II*'s instructions to the district court "impermissibly restricted the district court's factfinding ability."[122] The *ETCL III* court defended its instructions to the district court in *ETCL II* as "ordinary appellate review of factfinding that reached different conclusions for different types of violations."[123] Ultimately, the court held that the district court "did not have to list all sixteen thousand alleged violations and state whether each is justiciable or not"[124] even though such detailed fact-finding would be entailed by a true violation-by-violation approach to standing. The *ETCL III* dissent argued the plaintiffs did not offer non-speculative proof of causation and concluded that "[i]f we'd applied the rules properly, plaintiffs would have standing to challenge violations on approximately 40 days, not 3,651."[125]

Like Exxon in *ETCL III*, defendants in future environmental citizen suits may argue that an actual causation standard is more appropriate than the flexible causes or contributes to standard applied in previous cases. Future environmental citizen suit defendants in the Fifth Circuit could easily distinguish from cases like *Laidlaw* by pointing out that a very generalized approach to determining causation was used in those cases. Other circuit courts and the Supreme Court may adopt the Fifth Circuit's each-type-of-violation approach to determining standing with or

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116. *Env't Tex.*, 47 F.4th at 417.

117. *Id*.

118. *Id.* at 418 (rejecting Exxon's "conceptual" challenge to the district court's application of *ETCL II*'s standing framework).

119. Env't Tex. Citizen Lobby, Inc. v. Exxonmobil Corp., 968 F.3d 357, 371 (5th Cir. 2020) ("For any violation that could cause or contribute to flaring, smoke, or haze, the district court's findings have established traceability. The district court need only decide which violations fall within this category.").

120. *Id.*

121. *Id.*

122. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 418 (5th Cir. 2022).

123. *Id.*

124. *Id*. at 419.

125. *Id*. at 426 (Oldham, J., dissenting).

without disturbing the causes or contributes to standard. If other courts reject the causes or contributes to standard, future environmental citizen suit plaintiffs would be required to provide non-speculative proof that the defendant's violations were a but-for cause of their injuries. An actual causation standard would likely significantly limit the scale of environmental citizen suit plaintiffs' claims. Such plaintiffs might be able to carry the heavier burden of establishing actual causation by showing the extent to which a defendant's permit violations caused harm to their members' property.

Finally, the en banc Fifth Circuit could easily make the new violation-based approach even more stringent by adopting Exxon's view that "Article III requires plaintiffs to show that each challenged emission is a but-for cause of their injuries,"[126] and accepting Exxon's argument that *ETCL II* "impermissibly restricted the district court's factfinding ability."[127]

C. Exxon's Argument for Proportionate Penalty Assessment

The final issue resolved in *ETCL III* was whether the district court abused its discretion in ordering a $14.25 million penalty against Exxon.[128] On remand after *ETCL II*, the district court "found that almost all of the statutory factors favor a penalty."[129] In fact, the district court determined the only factor weighing against a penalty was Exxon's good faith and substantial efforts to improve environmental performance and compliance.[130]

In *ETCL III*, Exxon did not directly contest the district court's findings with respect to the economic benefit of noncompliance factor.[131] Instead, the company indirectly attacked the district court's penalty assessment by arguing that the district court should have "reduce[d] the value of its noncompliance" in proportion to the number of justiciable violations.[132] The *ETCL III* court disagreed and explained that proportionate penalty assessment "would give Exxon an unwarranted discount."[133] More specifically, the court relied on the fact that the district court "reduc[ed] the penalty multiplier from 50% of the value of noncompliance to 10%" in order to reject Exxon's argument for proportionate penalty assessment.[134]

In *ETCL III*, Exxon also challenged the district court's analysis of the duration and seriousness penalty factors, arguing that under a violation-based approach to determining standing, the district court should be obligated to consider the duration and seriousness of each violation individually.[135] First, the *ETCL III* court rejected Exxon's duration factor argument, holding that "a court may consider the overall length of the period during which the violations occurred" rather than the

126. *Id.* at 417 (rejecting Exxon's "unconvincing" but-for causation standard argument).

127. *Id.* at 418 (rejecting Exxon's "conceptual" challenge to the district court's justiciability determination).

128. *Id*. at 419.

129. *Id*. at 420.

130. *Id*.

131. *Id*. at 421.

132. *Id*.

133. *Id*.

134. *Id*.

135. *Id*. at 420–22.

duration of each individual violation.[136] Second, the court rejected Exxon's seriousness factor argument, holding that "the district court did consider [the seriousness of] each violation; it found that the traceable violations involved relatively high levels of emissions and necessarily considered the amount of each violation when it added them up. . . . "[137]

In general, Exxon's penalty assessment arguments in *ETCL III* attempted to capitalize on *ETCL II*'s violation-based approach to determining standing by taking the new approach to its logical conclusions. The *ETCL III* court was only able to reject Exxon's argument that the value of the economic benefit of noncompliance should be reduced in proportion to the number of justiciable violations because the district court reduced the penalty multiplier for this factor, perhaps in anticipation of Exxon's second appeal. The en banc Fifth Circuit could easily disagree and overrule these holdings.

Defendants in future environmental citizen suits will likely renew the argument for a penalty assessment that is proportionate to the number of actionable violations. Future plaintiffs, on the other hand, should be ready to advise district courts might ask district courts to reduce the penalty multiplier for the economic benefit of noncompliance factor to try to avoid proportionate penalty assessment.

By rejecting Exxon's duration factor and seriousness factor arguments, the *ETCL III* court implied that a cumulative analysis of harm can be used in the penalty assessment phase once plaintiffs establish standing for each type of violation. The court's holding with respect to the duration factor is supported by a handful of cases, but such cases are arguably not on point because no cases before *ETCL II* applied a violation-based approach to determining standing. Defendants in future environmental citizen suits may argue the duration factor refers to the duration of individual violations, not the span of time over which the violations occur. Future environment citizen suit plaintiffs, on the other hand, should argue for a cumulative analysis of duration. Similarly, future environmental citizen suit defendants may argue that the court must consider the seriousness of each violation individually while future plaintiffs should argue for an analysis of seriousness based on the cumulative effect of the defendant's violations.

CONCLUSION

Environmental citizen suits brought under the CAA and other federal environmental laws will likely become larger and more common in the future. In response to the growing size and frequency of environmental groups' claims, federal courts beyond the Fifth Circuit may begin viewing defendants' violations of federal environmental law in isolation for the purpose of determining standing. Eventually, the federal circuit courts may split on the issue of whether environmental group

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136. *Id*. at 421–22 (citing Pound v. Aerosol Co., Inc., 498 F.3d 1089, 1098 (10th Cir. 2007); United States v. Vista Paint Corp., 1996 U.S. Dist. LEXIS 22129, 1996 WL 477053, at *15 (C.D. Cal. Apr. 16, 1996); United States v. B & W Inv. Props., Inc., 1994 U.S. Dist. LEXIS 1751, 1994 WL 53781, at *4 (N.D. Ill. Feb, 18, 1994); United States v. Midwest Suspension & Brake, 824 F. Supp. 713, 736-37 (E.D. Mich. 1993); United States v. A.A. Mactal Const. Co., Inc., 1994 U.S. Dist. LEXIS 1751, 1992 WL 245690, at *3 (D. Kan. Apr. 10, 1992).

137. Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp., 47 F.4th 408, 422 (5th Cir. 2022).

plaintiffs must prove standing for each claim, each type of violation, or each individual violation.

Environment Texas represents the birth of the new violation-based standing test as well as the Fifth Circuit's uncertainty about how to apply it. For now, this area of the law is very much up in the air. At this point, *Environment Texas* shows how environmental citizen group plaintiffs' attempts to hold heavily regulated corporations liable for every recorded violation of environmental law can backfire when courts develop new rules to fairly limit the scale of plaintiffs' claims. Moreover, *ETCL II* and *III* may be signals of what is to come in future environmental citizen suits or they could be anomalous decisions to be overturned by the upcoming en banc Fifth Circuit rehearing of the case.

Although viewing violations of federal environmental law in isolation may "ignore[] the complexity and interlocking nature of environmental harm[,]"[138] a violation-based test for standing represents an exercise of judicial restraint in an area of law over which Congress, the EPA, and the states must exercise primary control. Until such control is exercised, district courts may be required to sift through thousands or tens of thousands of alleged violations to determine which are actionable. Thus, future environmental citizen suit plaintiffs should be ready to produce highly detailed, non-speculative evidence showing injury-in-fact, causation, and redressability for each violation, or at least each type of violation, they allege. Finally, future environmental citizen suit defendants will likely continue to argue against the causes or contributes standard for determining causation and in favor of a true violation-by-violation approach to determining standing in and perhaps beyond the context of CAA citizen suits.

138. *See* Barron, *supra* note 56, at 718.